



## **EU Member States Consultation: Review of the EC Directive on the re-use of public sector information**

### **Answers to questions submitted to Member States [and more generally] from the UK Advisory Panel on Public Sector Information (APPSI)**

**Note:** The answers provided by the Advisory Panel on Public Sector Information (APPSI)<sup>1</sup> in response to the European Commission's consultation have been drawn from APPSI's report, *The impact and success of legislation on the re-use of public sector information (Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 and the UK Regulations)*, July 2008. This report can be accessed at the following website: <http://www.appsi.gov.uk/reports/ec-submission-07-2008.doc>

APPSI recommends that the EC cross-references to APPSI's report in order to obtain substantive and more detailed answers to its consultation questions.

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#### **I. Implementation and impact of the Directive**

##### **1. In addition to transposition measures, could you please indicate additional practical / deployment measures (e.g. national portals, asset lists, etc.) that have been taken in your State or by the main Public Sector Content Holders in your country to facilitate the re-use of PSI?**

APPSI's focus is the re-use of PSI and, specifically, encouraging greater use of PSI. In the UK, it is OPSI<sup>2</sup> that has responsibility for policy and regulation of the re-use of PSI. Much of OPSI's and APPSI's work in this context is governed by 'The Re-Use of Public Sector Information

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<sup>1</sup> APPSI is an advisory body and comprises 20 members drawn from commercial, government and academic sectors. It advises UK Ministers and the Director of OPSI. See <http://www.appsi.gov.uk/members/index.htm>.

<sup>2</sup> Office of Public Sector Information (OPSI); <http://www.opsi.gov.uk/>.

Regulations 2005<sup>3</sup> (the Regulations) introduced by the UK government to implement the Directive. A detailed account of the impact of the Regulations and of progress that has been made in the UK since they came into force was published by OPSI in July 2008.<sup>4</sup>

The UK was one of eight Member States to have implemented the Directive by the 1st July 2005 deadline. The effect of the Directive in the UK has been beneficial in a number of ways. It has:

- given greater prominence to the re-use of PSI on the political agenda;
- helped to fuel debate about proper policy in this area;
- applied a degree of pressure on PSI producers to make information available (though not in all cases);
- provided ground-rules which make it easier for potential private sector PSI re-users to apply leverage to PSI producers to allow re-use of their data.

*For further details, see ‘Chapter 4: Achievements to date from implementing the Directive in the UK’, paragraphs 4.1 – 4.5.*

## **2. Do you consider that the Directive has had an impact on the information market in your country? If so, how?**

Notwithstanding the achievements cited above in answer to question 1, serious concerns have been expressed about the effectiveness of the re-use regime as it has operated in the UK. The bulk of APPSI members believe that there has not been a step change in the re-use of PSI in the UK as a result of implementation of the Directive. Ten years ago the barriers to re-use of PSI were mainly the cost and complexity of digitising public records, the limitations of bandwidth and distribution channels and the level of technical skill of the potential user-base. Even in 2003, these constraints were still significant. Since then, the explosion of Internet capability and usage has reduced these constraints hugely. Now, even though much PSI can technically be made easily available, other constraints have become the main ‘road blocks’ to its exploitation and the growth of new enterprises, products and services through innovation. The UK government has made it clear that such innovation is central to future UK success.<sup>5</sup>

*For further details, see ‘Chapter 5: Concerns expressed about the current situation’, paragraphs 5.1 – 5.3.*

## **3. Has the implementation of the Directive resulted in a revised charging policy by public sector bodies?**

A key issue for the UK, as for any Member State, is how far the collection, production and dissemination of PSI should be financed by the taxpayer and how far, if at all, it should be financed by the user. This is not just a matter of finance policy, but of economic efficiency and social utility. If the primary objective is to maximise revenue generation from re-use charges (and thereby reduce the burden on taxation), this may well reduce the extent to which PSI is re-used

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<sup>3</sup> Statutory Instrument 2005 No. 1515, laid before Parliament 10th June 2005 and enacted 1st July 2005.

<sup>4</sup> The United Kingdom Implementation of the European Directive on the Re-use of Public Sector Information – the first two years, July 2007; <http://www.opsi.gov.uk/advice/psi-regulations/uk-implementation-first-years.pdf>; and The United Kingdom Report on the Re-Use of Public Sector Information 2008, <http://www.opsi.gov.uk/advice/psi-regulations/uk-report-reuse-psi-2008.pdf>.

<sup>5</sup> See for instance ‘The Race to the Top: a review of Government’s Science and Innovation Policies’ by Lord Sainsbury of Turville, October 2007 for HM Treasury see [http://www.hm-treasury.gov.uk/media/5/E/sainsbury\\_review051007.pdf](http://www.hm-treasury.gov.uk/media/5/E/sainsbury_review051007.pdf)

through pricing levels which make it outside the reach of some user groups – not all of which have equal purchasing power (c.f. utility companies and Non-Governmental Organisations). There is common experience and agreement that provision of PSI at marginal or zero cost increases the number of users. Examples from as far apart as Australia and Austria support this view.<sup>6</sup> There has also been some debate in the UK of whether the ‘user pays’ or the ‘free provision of data collected at taxpayer expense’ model provides the greatest overall benefit to society. Within the UK three major reports having been published on different elements of it in the last 18 months and a study for Ministers on the business model of the Trading Funds now underway for Ministers.

*For further details, see ‘Chapter 6: Charging Policy in the UK’, paragraphs 6.2.1 – 6.2.6; and ‘Chapter 6: Accounting and Charging’, paragraphs 6.10.1 – 6.10.10. See also Boxes 1, 2 and 3 in Chapter 5, which refer to three major reports have been produced by or for the UK government since December 2006 that review aspects of PSI re-use in the UK.*

#### **4. What kind of problems do you believe private companies in your country are encountering when wishing to reuse public sector information?**

**Interaction between government and markets in the UK:** Given the existence of growing and potentially much larger markets for PSI, a key issue is the interaction between government and markets. Specifically, the issue is the impact the public sector can have on the way markets work. This was the context of the CUPi Study.<sup>7</sup>

In its response<sup>8</sup> to the CUPi Study, APPSI broadly agreed with the OFT’s conclusions. But it questioned whether the ‘bottom-up’ approach adopted by the OFT in valuing PSI made sense, pointing out that it was likely to seriously underestimate, and indeed mask, the value of the PSI market for those products and services where PSI is absolutely necessary. The result is, APPSI believes, a serious underestimate of the true value of PSI to the economy.

*For further details, see ‘Chapter 6: Interaction between government and markets in the UK’ paragraphs 6.1.1 – 6.1.3.*

**Enforceability:** When it considered the implementation of the Directive in UK law, APPSI was originally concerned to create a relatively ‘light touch’ process for handling complaints against PSBs that were alleged to be in breach of the obligations created under the Directive. However one of the problems experienced by private companies is the absence of real sanctions that could be applied in cases where PSBs are non-compliant.

*For further details, see ‘Chapter 6: Enforceability’, paragraphs 6.3.1 – 6.3.4.*

**Non-mandatory PSI:** The Directive does not contain an obligation to allow re-use of documents (Recital 9). It is difficult to see how the full benefit of PSI re-use as a basis for economic growth and social utility can be enjoyed unless the re-use of PSI is proactively facilitated by PSBs. However, evidence obtained from local authorities (governments) in the UK suggests an alarming lack of awareness and engagement with the issues, or interest in promoting the re-use of PSI held by them.<sup>9</sup> The most recent survey by PSI Research show that, of the 75% of all local authorities in England and Wales responding to the survey, 8 out of 10 admit they have not produced an

<sup>6</sup> See: [http://ec.europa.eu/information\\_society/policy/psi/comm\\_info/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/comm_info/index_en.htm)

<sup>7</sup> See [http://www.offt.gov.uk/advice\\_and\\_resources/publications/reports/consumer-protection/oft861](http://www.offt.gov.uk/advice_and_resources/publications/reports/consumer-protection/oft861).

<sup>8</sup> See: <http://www.appsi.gov.uk/reports/cupi-response.pdf>.

<sup>9</sup> See the research conducted by PSI Consulting Ltd., which can be found at: [http://www.epsiplus.net/news/426\\_psih\\_s\\_surveyed\\_re\\_psi\\_directive](http://www.epsiplus.net/news/426_psih_s_surveyed_re_psi_directive).

Information Asset Register and a number have made it clear that they do not intend to comply with the Regulations since these are not mandatory. APPSI draws the conclusion that, in the absence of an obligation to permit re-use, there is little or no incentive for PSBs to make PSI available for re-use, especially those with limited resources and other priorities.

*For further details, see ‘Chapter 6: Supply of PSI non-mandatory’, paragraphs, 6.4.1 – 6.4.4*

**Definition of ‘document’:** Documents whose supply is outside the public task of the PSB are excluded from the scope of the Directive i.e. there is no encouragement to make the information available for re-use. Typically these include documents that are produced and charged for exclusively on a commercial basis, sometimes in competition with others in the market. The Directive's definition of ‘document’ is not intended to cover computer programmes.

The definition used in the Directive is very wide and is capable of applying to any type of information, from individual bytes to digital datasets, where a potential dataset may comprise Megabytes, Gigabytes or even Petabytes. The breadth of the definition is not in itself a problem: indeed, the definition needs to be wide and flexible. Difficulties can, however, arise in the context of charging because the very flexibility of the definition can facilitate manipulation. For example, tensions can arise where a re-user requires an extract from a dataset, but the public sector body's need to recover the costs of producing the larger dataset leads it to levy a charge based on the entirety of those costs, rather than the fraction attributable to the extract. Examples have occurred of a lack of transparency of costs and the calculation of charges. These have, in some cases, made it very difficult to develop any reasonable dialogue between producers and re-users of data based on a common understanding of a ‘cost per document’.

*For further details, see ‘Chapter 6: What is a document?’, paragraphs 6.5.1 – 6.5.3; and ‘Chapter 6: Accounting and Charging, paragraphs 6.10.3-6.10.9.*

**Definition of ‘public sector body’:** APPSI notes that there is a category of information, originally produced to discharge a public function, which retains the character of PSI, but which falls outside the scope of the Directive because it is held by bodies that are not PSBs. These are often bodies that were PSBs but have since been given another status. In the UK an example is the Royal Mail. In some Member States (but not all) this type of PSI remains in the public sector, which creates anomalies of treatment across the EU, impeding harmonisation.

*For further details, see ‘Chapter 6: Definition of ‘public sector body’, paragraphs 6.6.1 – 6.6.2.*

**Definition of Public Task:** The term ‘public task’ plays a crucial role in the Directive since documents whose supply falls outside a PSB's public task are excluded from its application. In its role of complaints review, the Review Board of APPSI has already had first hand experience in the lack of clarity as to what is covered by ‘public task’ and has highlighted the need for clearer definitions of the term and the processes to define ‘public task’.<sup>10</sup>

*For further details, see ‘Chapter 6: Definition of Public Task?’, paragraphs 6.7.1-6.7.6.*

**Third Party IPR Input?:** Strictly construed, the PSI Directive does not apply where a third party holds relevant IPR in the material. This wide-ranging exclusion, which lacks specificity, catches

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<sup>10</sup> See the recommendations of the Review Board in review of the complaints by Intelligent Addressing and Ordnance Survey (2007): (<http://www.appsi.gov.uk/review-board/review-SO-42-8-4.pdf>).

PSI where only a small element of a third party IPR has been included. This can have unintended consequences. Public Sector IPR in the public task should not be a limitation.

*For further details, see ‘Chapter 6: Third Party IPR Input?’, paragraphs 6.8.1 – 6.8.5.*

**Lack of penalties:** OPSI and APPSI have given considerable thought to the most proportionate method of enforcement, weighing up the cost of compliance, the cost of establishing a new dedicated regulator, the disincentive created by sole reliance on court proceedings (among other factors). The balance of views among APPSI members when considering this issue in 2004 in the context of how the Directive should be implemented in UK law favoured the establishment of a dedicated independent regulator, to ensure compliance.

*For further details, see ‘Chapter 6: Lack of penalties?’, paragraphs 6.9.1 – 6.9.5.*

**Exclusive Arrangements:** APPSI is not aware that there has been a notable reduction in the number of exclusive arrangements in the UK since implementation of the Directive, although there is evidence that some PSBs converted some arrangements into non-exclusive licences in anticipation of the Regulations coming into force. It is hard to identify exclusive licences, where they do exist, and to quantify the problem. It is also hard to know how far, in the absence of the Directive, the number of exclusive arrangements would have increased.

*For further details, see ‘Chapter 6: ‘Exclusive Arrangements’, paragraphs 6.11.1 – 6.11.2.*

## **II. Scope of the Directive**

### **5. Would it be appropriate to include cultural establishments, education and research organisations and public service broadcasters, within the scope of the Directive?**

*No comments from APPSI*

### **6. What would be the impact and societal benefits of including these sectors within the scope of the Directive? What are the problems these excluded sectors may encounter should they be included within the scope of the Directive?**

*No comments from APPSI*

## **III. Looking ahead**

### **7. What technical, organisational, legal and practical measures could be established by national administrations and / or at European level to optimise the re-use of PSI (e.g. efficient dispute settlement mechanisms)?**

APPSI recommends that, with certain explicit exceptions, PSBs should be *required* to make PSI available for re-use. At the very least, guidance should be issued creating a presumption that PSI should be available unless the specified exceptions apply. We have recommended that UK action is taken to ensure that all UK PSBs should at least have to meet the requirements of Information Fair Trader Scheme, revised if necessary to include the Regulations.

APPSI recommends that high-level policy guidance be provided by the Commission on interpretation of the concept of ‘public task’ and that the UK government put in place a process

for its definition and periodic review. This process should involve public consultation and the process should not be solely the preserve of the individual PSB.

The bulk of the APPSI members believe that guidance should be provided to give much greater force to the encouragement in the Directive for adoption of a marginal cost regime (for most documents), and to clarify whether, and the extent to which, the costs that can be re-charged to re-users should relate to the documents in question or to documents in general; and also that guidance be provided on principles that should apply to the calculation of costs, following best practice in Member States. The bulk of the APPSI members have urged the UK government to move to a marginal cost pricing model for PSI.

APPSI recommends that wherever exclusive arrangements remain, a justification should be published, and that all such information about exclusive arrangements should appear in one place for each Member State.

APPSI has recommended to the UK government that it launches an awareness-raising campaign for the merits of PSI re-use and that consideration is given to provision of modest funding if necessary to oil the process. APPSI stands ready to help OPSI and Ministers define an appropriate communications strategy and support for the campaign.

**8. Should legislative amendments be introduced in the Directive to make it more efficient? If so, which ones and why? Would guidelines on proper implementation and application of the Directive be useful?**

APPSI members believe that making mandatory the supply of PSI for re-use by PSBs would greatly enhance the probability of achieving the original aims of the Directive.

APPSI recommends that the Directive be amended to ensure that PSI originally created as part of the public task of a PSB or integral to the discharge of a public function should be within the scope of the Directive.

APPSI recommends that the Directive be amended to clarify the scope of the exclusion of documents in which third parties own intellectual property rights, so as to bring within the scope of the Directive documents where the third party is another EU public sector body; documents containing re-usable content that is not protected by the third party rights; and documents where the third party has licensed the document for re-use.

**9. Additional comments**

We look to the Commission to enhance the tools they already have and to use them to harmonise and foster the re-use of PSI across Europe.