

Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/98/EC on re-use of public sector information'

COM(2011) 877 final — 2011/0430 (COD)

(2012/C 191/22)

Rapporteur: **Ms CAÑO AGUILAR**

On 17 and 18 January 2012, the European Parliament and the Council respectively decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the

Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/98/EC on re-use of public sector information

COM(2011) 877 final — 2011/0430 (COD).

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 11 April 2012.

At its 480th plenary session, held on 25-26 April 2012 (meeting of 25 April), the European Economic and Social Committee adopted the following opinion by 133 votes to 2 with 2 abstentions.

1. Conclusions

1.1 The EESC welcomes the review of Directive 2003/98/EC of the European Parliament and of the Council, of 17 November 2003, on re-use of public sector information⁽¹⁾ (the PSI Directive), insofar as it makes it considerably easier for public data to be used more efficiently and is one of many actions designed to achieve the goals of the Europe 2020 strategy.

1.2 The Committee would highlight that the amendment to the PSI Directive is needed as a result of the digital revolution, the growing volume of information held by the authorities and the economic importance of this matter, which is estimated to total EUR 140 billion. There is also a need to remedy shortcomings identified in current regulations and to incorporate the principles adopted by the OECD in 2008.

1.3 The new regulation - which includes aspects proposed by the EESC in its previous opinion - is part of the package of measures forming the Digital Agenda, which is one of the EU's key strategies.

1.4 Upholding the right of access to public information as a sole and exclusive competence of Member States, the new regulation introduces a sea-change by establishing re-use as an obligation for the Member States.

1.5 The Committee considers that the re-use of public information should be regulated by means of a regulation in order to standardise Member State legislation and to overcome

the differences identified in the transposition of the PSI Directive.

1.6 The reform extends the scope of re-use to cover museums, libraries and archives, while also improving practical arrangements to facilitate data searches.

1.7 In the EESC's view, the reform of the PSI Directive is also justified by the enormous potential - as yet insufficiently exploited - of public information in three key areas, since it helps to:

— boost the internal market, strengthening European businesses and creating jobs;

— promote consistency with other EU policies;

— foster government transparency, efficiency and accountability.

1.8 The new charging rules reject the idea that searches must be free of charge. It will be up to each Member State to decide whether or not to apply charges. If they decide to do so, charges should not exceed marginal costs, although there are exceptional cases in which higher charges may be applied. The principle of cost recovery currently in force is upheld on a residual basis. The EESC welcomes the changes in this area.

⁽¹⁾ OJ L 345, 31.12.2003, p. 90.

1.9 With regard to establishing an independent authority to rule on appeals against decisions not to authorise re-use, the EESC believes that such a body does not necessarily need to be created from scratch; an existing authority could be appointed to undertake this task, provided that impartial and independent decision-making can be guaranteed.

1.10 The new regulation contains a reference to the economic or moral rights of employees of public sector bodies, to cover specific situations in certain EU Member States.

1.11 The Committee endorses the need to strengthen the text of the proposal on the protection of personal data, which would require a thorough assessment on a case-by-case basis, striking a balance between the right to privacy and the right to public access.

2. Background

2.1 Directive 2003/98/EC (the PSI Directive) marked a major step towards promoting the re-use of the increasing amount of information held in the public sector, by laying the foundations for a European legal framework to harmonise the basic conditions for re-use and removing any barriers that could hamper re-use.

2.2 Article 13 of the PSI Directive required the European Commission to carry out a review of the directive by 1 July 2008, addressing ‘*in particular ... the scope and impact of this Directive, including the extent of the increase in re-use of public sector documents, the effects of the principles applied to charging and the re-use of official texts of a legislative and administrative nature, as well as further possibilities of improving the proper functioning of the internal market and the development of the European content industry*’. This review was presented in Communication COM(2009) 2012, which suggested that despite the progress that has been made, major barriers still exist, including attempts by public sector bodies to maximise cost recovery, as opposed to benefits for the wider economy, competition between the public and the private sector, practical issues hindering re-use, such as the lack of information on available PSI, and the mindset of public sector bodies failing to realise the economic potential.

2.3 Other factors that, in the Commission’s view, justify the review of the directive are:

- the huge increase in data volume;
- the continuous digital revolution, which raises the value of the public sector’s assets in the field of information and content;

- the growing economic importance of PSI in terms of total, direct and indirect economic gains, based on PSI applications and usage in the economy of the EU 27, is estimated to be in the order of EUR 140 billion annually⁽²⁾;

- the fact that considerable potential for re-using PSI still exists. Although some Member States have made considerable progress, much remains to be done, given, amongst other things, the increase in PSI re-use in certain international contexts.

2.4 The most important aspects it is proposed to amend with this draft directive concern: the scope, the general principle applicable to re-use, the economic or moral rights of employees of public bodies, the principles of charging and the practical arrangements for facilitating searches.

3. General comments

3.1 *PSI and the Digital Agenda*

3.1.1 The EESC considers that the proposed reform is broadly appropriate as regards remedying recognised shortcomings in the PSI Directive. As well as meeting the demands of EU stakeholders, who have highlighted serious problems in the current legislation, the amendment incorporates principles set out in the OECD recommendation Seoul, 17-18 June 2008⁽³⁾ for enhanced access and more effective use of public sector information.

3.1.2 The EESC also wishes to emphasise that the review is part of a package of measures forming the Digital Agenda, which consists of three lines of action: adapting the legal framework for the re-use of public data, mobilising financing instruments and improving coordination across the Member States⁽⁴⁾.

3.2 *The right to re-use*

3.2.1 The new regulation marks a significant change, by establishing re-use as a right. Under the current system, the decision as to whether or not to authorise re-use falls to each Member State. The fact that the link between the right to access

⁽²⁾ The ‘Vickery report’ contains an in-depth analysis of this matter. See ‘Review of Recent Studies on PSI Re-Use and Related Market Developments’ - Final Version - Graham Vickery, 2010. http://ec.europa.eu/information_society/digital-agenda/index_en.htm.

⁽³⁾ Adopted in Seoul, 17-18 June 2008.

⁽⁴⁾ Commission Communication on Open data - An engine for innovation, growth and transparent governance, COM(2011) 882 final, Brussels, 12.12.2011.

and the right to re-use is explicit in some national legislation but insufficiently clear in others gives rise to a degree of legal uncertainty.

3.2.2 The EESC therefore wishes to highlight and support the proposed changes in this area, which are that:

- the **right to access** public information remains the sole and exclusive competence of the Member States and does not fall within the scope of the PSI Directive ⁽⁵⁾;

- when information is public and accessible in line with national legislation, the **re-use** of public information for commercial or non-commercial purposes – with the exceptions expressly provided for – becomes an **obligation** for Member States, with the new wording of Article 3 stating that these ‘shall ensure that documents ... shall be re-usable’. This is an essential step towards developing a homogeneous European framework.

3.2.3 The right to re-use builds on the approach set out by the EESC in its previous opinion ⁽⁶⁾, to the extent that the obligation to re-use data does not mean ‘*just passively making them available but a duty of active promotion*’.

3.2.4 Given the differences in the PSI Directive’s transposition, the EESC considers that closer harmonisation is needed, which would require a proposal for a regulation.

3.3 Extension of the scope

3.3.1 As the EESC proposed in its opinion on the PSI Directive, the new regulation will include documents held in museums, libraries and archives. It will also apply to university libraries, except in respect of documents protected by intellectual property rights (the new wording of Article 1(2)(e)). This would bring a substantial amount of information within the directive’s scope, thereby making it more effective.

3.4 Improving search arrangements

3.4.1 The EESC considers the proposed regulation of practical arrangements facilitating information searches (Article 9) to be appropriate insofar as it includes metadata,

⁽⁵⁾ Article 1.3.

⁽⁶⁾ EESC Opinion on Commercial exploitation of public sector documents, OJ C 85, 08.4.2003, p. 25.

the provision of information in ‘machine-readable format’ and portal sites that are linked to decentralised asset lists.

3.5 Need for reform due to the potential of public information

3.5.1 The documentation stored in public bodies has applications in many fields related to knowledge, social conditions, science, economics and culture, among others. These include geographical, meteorological, environmental and economic information, information on traffic and transport, tourism, agriculture, legal journals and case law, statistical publications, social data, etc. ⁽⁷⁾. As a result, their exploitation contributes to economic growth, development of the internal market, strengthening businesses and job creation.

3.5.2 Greater use of public information is in line with other EU policies, such as competition policy, the Integrated Maritime Policy, the common transport policy, the need to encourage open access to scientific information and policy on digitisation and cultural heritage.

3.5.3 Promoting re-use will also help foster transparency, efficiency and accountability in government.

4. Specific comments

4.1 Charging ⁽⁸⁾

4.1.1 The most controversial aspect of the current regulation is the price that people wishing to access information are obliged to pay. Excessive charges and the lack of transparency in the way these are set have led to complaints from users and form a serious barrier to promoting the re-use of public information.

4.1.2 The proposed reform rejects the idea put forward by certain stakeholders of searches having to be free of charge (the zero cost option). It opts instead for new charging principles, according to which:

- each Member State will decide whether or not a charge should apply;

- if it decides to apply a charge, this should be limited to the **marginal costs** incurred for their reproduction or dissemination;

⁽⁷⁾ The Vickery report identifies 13 fields, which in turn cover a number of different subject areas.

⁽⁸⁾ See Deloitte Pricing of PSI Study, Luxembourg 2011. http://ec.europa.eu/information_society/policy/psi/docs/pdfs/minutes_psi_group_meetings/presentations/15th/03_01_study_economic_deloitte.pdf.

- the principle of marginal cost is not universally applicable, which means that higher charges may be imposed in the exceptional cases provided for in the new Article 6(2), in particular where public sector bodies generate a substantial part of their operating costs from the exploitation of their intellectual property rights. This exception is subject to strict requirements: charges must be set 'according to objective, transparent and verifiable criteria, provided this is in the public interest and subject to the approval of the independent authority' as provided for in the reform of the directive;
- charges over and above marginal costs could also be set for 'libraries (including university libraries), museums and archives';
- the burden of proving that charges comply with the requirements of the directive lies with the public sector body providing users with information.

4.1.3 The proposal thus introduces the general principle of **marginal cost** and upholds the principle of **cost recovery** in the current Article 6 on a residual basis, despite deeming it to be '*inadequate for incentivising activities based on the re-use of public data*' (3. Legal elements of the proposal; 3.2 Subsidiarity and proportionality, paragraph 5).

4.1.4 The EESC, which welcomes this change, believes that the wording of the proposed amendment to the charging principles set out in Article 6 needs to be clarified, expressly stating the exceptional nature of the principle of cost recovery.

4.1.5 In the EESC's view, it would be feasible to establish the principle that information should be entirely free of charge, at least in certain cases of re-use for non-commercial purposes.

4.2 An independent authority

4.2.1 For situations in which a request for re-use is turned down, the new regulation establishes that means of redress should include the '*possibility of review by an independent authority that is vested with specific regulatory powers regarding the re-use of public sector information and whose decisions are binding upon the public sector body concerned*' (added to Article 4(4)).

4.2.2 The proposal does not specify the characteristics or membership of this 'independent authority', quite rightly leaving these aspects to the discretion of each Member State. The EESC considers that such a body does not necessarily need to be created from scratch; an existing authority could be appointed to undertake this task, provided that impartial and

independent decision-making can be guaranteed. Nevertheless, on the basis of experience since the entry into force of the PSI Directive – in some cases the interpretation of the system for accessing and disseminating public information has been restrictive – the new paragraph should also include, following the words '*public sector information*', '*... especially as regards the scope of the general principle set out in Article 3 and whose decisions ...*'.

4.2.3 In any event, the EESC would emphasise that account should be taken of the opinion of the European Court of Justice on the concept of independence, which excludes not only any influence that bodies being supervised might exert, but also any outside direction or influence, whether direct or indirect, which could hamper such independent authorities in exercising the functions entrusted to them ⁽⁹⁾.

4.3 Intellectual property and the economic or moral rights of employees

4.3.1 In line with national and international intellectual property legislation, the proposal for a revision preserves '*the economic or moral rights that employees of public sector bodies may enjoy under national rules*' (paragraph added to Article 1(5)). This is an aspect overlooked by the PSI Directive and its inclusion reflects specific situations in some Member States concerning the ownership of rights to data held in the public sector.

4.3.2 The complexity of issues relating to intellectual property and the principles of subsidiarity and minimum intervention suggest that the resolution of any disputes that may arise should be left to the legal and judicial systems of each country, as is rightly proposed in the text addressed in this opinion.

4.4 Protection of personal data

4.4.1 The PSI Directive includes the processing of personal data (Article 4(4)), pointing out that it '*leaves intact and in no way affects the level of protection of individuals with regard to the processing of personal data under the provisions of Community and national law, and in particular does not alter the obligations and rights set forth in Directive 95/46/EC*' ⁽¹⁰⁾.

⁽⁹⁾ Judgment of 9 March 2010 (C-518/07).

⁽¹⁰⁾ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281, 23.11.1995, p. 31.

4.4.2 This provision is valid, but the importance of the matter and constant technological innovation require greater emphasis, given that it raises a number of issues such as the legitimacy of public dissemination, special protection for sensitive data, transfers to third countries and the principle of purpose. The EESC considers that, as indicated by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data, the text should contain the requirement for public bodies to carry out 'a careful and case-by-case assessment in order to strike the balance between the right to privacy and the right to public access' ⁽¹⁾.

Brussels, 25 April 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON

⁽¹⁾ http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp83_en.pdf.