

EUROPEAN DATA PROTECTION SUPERVISOR

Summary of the opinion on the proposal for a recast of the Public Sector Information (PSI) re-use Directive

(The full text of this Opinion can be found in English, French and German on the EDPS website www.edps.europa.eu)

(2018/C 305/07)

The Public Sector Information (PSI) Directive aims to facilitate the re-use of public sector information throughout the European Union by harmonising the basic conditions that make PSI available to re-users, to enhance the development of Community products and services based on PSI and to avoid distortions in competition.

The new provisions include the extension of the scope of the Directive to documents held by public undertakings active in the areas on procurement such as entities operating in the water, energy, transport and postal services sectors. Moreover, it applies to documents held by public undertakings acting as public services operators, as long as such documents are produced as part of the services in the general interest. In addition, the Proposal's scope will also be extended to specific research data such as results of scientific fact-finding processes.

The Opinion focuses on specific recommendations in order to better clarify the relation and coherence of the PSI Directive with the GDPR exceptions and on the reference to applicable data protection law. Additionally it provides for further recommendations on anonymisation and its relation to costs and data protection, also focusing on a data protection impact assessment, while taking into account an 'acceptable re-use policy'.

The EDPS with this Opinion on PSI re-use builds on the work already done on the 'Good Big Data' (the 'EU values-based data sharing'), and notably on EDPS opinions and formal comments previously issued, consistently with our practice on supervision cases. Moreover, we point out to the issues that need harmonization at EU level to allow the recast of the PSI Directive to rip the expected benefits.

In the context of Article 1(2)(g) of the Proposal, the EDPS recommends to better clarify the relationship and coherence of the PSI with the GDPR by putting forward a drafting suggestion.

Moreover, the EDPS suggests to re-introduce the specific provision currently contained in Article 1(4) of the Directive 2013/37/EU in the main provisions of the Directive and to clearly state in the Proposal that the definition of 'personal data' according to Article 4(1) of the GDPR applies. The EDPS also recommends to add the reference to the Supervisory Authority set up by Article 51 of the GDPR under Article 4(4) of the Proposal.

The EDPS also recommends to support the use of anonymisation by making a reference to 'anonymous information' in the legal text and extending the scope of the entities entitled to include anonymisation costs within the costs that can be charged to reusers.

As a last recommendation, the EDPS suggests to provide for data protection impact assessments, for specific sectors dealing with sensitive data, such as the health sector, on which the licensor should base its decision and consequently take into account the conditions for re-use.

1. INTRODUCTION AND BACKGROUND

1. On 25 April 2018, the Commission adopted a Proposal for a Directive amending Directive 2013/37/EU (following a review of Directive 2003/98/EC) on the re-use of public sector information (PSI) (the 'Proposal'). The Proposal is part of the '2018 Data Package', which also includes other important documents: (i) a Commission Communication entitled 'Towards a common European data space' (the 'Communication'); (ii) Guidance on sharing private sector data, in the form of a Staff Working Document ('Guidance'); and (iii) an evaluation of the PSI Directive.

2. The objective of the Proposal is to update and amend the existing text of Directive 2013/37/EU and Directive 2003/98/EC on re-use of public sector information (the PSI Directive).
3. The review of the Directive is one of the three 'measures' proposed by the Commission towards a common data space in the EU (see the 'umbrella' Communication from the Commission COM (2018) 232, hence 'the Communication'), together with the Guidance on sharing private sector data [...] and the update of the Recommendation on access to and preservation of scientific information [...].
4. In proposing to amend the PSI Directive, the European Commission aims to facilitate the re-use of public sector information such as legal, traffic, meteorological, economic and financial data throughout the European Union by harmonising the basic conditions that make PSI available to re-users, to enhance the development of Community products and services based on PSI and to avoid distortions in competition.
5. In particular, the Proposal's overall objective is to be in line with the Digital Single Market Strategy's objectives. The Proposal aims to enhance the effect of the Directive by strengthening specific provisions and modifying them accordingly in order to increase the amount of public sector data available for re-use. Specifically, the initiative also aims to strengthen Small and Medium Enterprises' position in the data market by granting fairer competition and an easier access to markets, together with the enhancement of cross-border innovation.
6. Relevant new provisions to the Directive include the extension of its scope to documents held by public undertakings active in the areas on procurement by entities operating in the water, energy, transport and postal services sectors. Moreover, it applies to documents held by public undertakings acting as public services operators, as long as such documents are produced as part of the services in the general interest. The proposal's scope will also be extended to specific research data such as results of scientific fact-finding processes (i.e. experiments and surveys). The Proposal in practice '(...) lays down a horizontal framework providing minimum harmonisation of reuse conditions across domains and sectors.'⁽¹⁾
7. The EDPS positively notes that according to the European Commission the recast of the PSI Directive aims to foster the reuse of public sector information, as pointed out in the Communication, by '*reducing market entry barriers, in particular for small and medium-sized enterprises; minimising the risk of excessive first-mover advantage, which benefits large companies and thereby limits the number of users of the data in question; increasing business opportunities by encouraging the publication of dynamic data and the uptake of application programming interfaces (APIs).*'⁽²⁾
8. The PSI directive is part of the EU vision on the fostering of 'Good Big Data'. Public sector information is a key source of 'the raw material' of the Big Data of the Digital Single Market. The smart use of data, including its processing via Artificial Intelligence, can have a transformative effect on all sectors of the economy.
9. Already in September 2016, the EDPS, with the *Opinion on coherent enforcement of fundamental rights in the age of big data*⁽³⁾, has put forward a strategy for shaping an EU cyberspace based on EU values, pointing out to issues such as concentration of market and informational power; and a weak market for Privacy Enhancing Technologies (PETs) as measures for minimising personal data processing without losing the functionality of a product or a service (as inspired by the principle of privacy by design⁽⁴⁾ and by default).
10. Moreover, the EDPS would like to recall the data protection-relevance of the 'key principles' that, according to the European Commission, should be respected in the context of data re-use, namely (i) minimised data lock-in and ensure undistorted competition; (ii) transparency and societal participation on the purpose of the reuse vis-à-vis the citizens/data subjects as well as transparency and clear purpose definition between the licensor and the licensees; (iii) data protection impact assessment and appropriate data protection safeguards for reuse (according to a 'do no harm'- under the data protection viewpoint- principle).
11. While the EDPS has been informally consulted by the European Commission, it has not been formally consulted as required by Article 28(2) of Regulation (EC) No 45/2001. The Opinion is therefore based on Article 41(2) of the same Regulation. The EDPS recommends that a reference to this Opinion be included in the preamble of the adopted instrument.

⁽¹⁾ Explanatory memorandum to the Proposal for a Directive of the European Parliament and the Council on the re-use of public sector information (recast), p. 3.

⁽²⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Towards a common European data space', p. 5

⁽³⁾ https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf, on re-use, p. 9.

⁽⁴⁾ European Data Protection Supervisor Opinion 05/2018-Preliminary Opinion on Privacy by Design

7. CONCLUSION

Therefore the EDPS recommends:

- to modify Article 1(2)(g) of the Proposal and to provide for specific wording on the difference between ‘documents’ and ‘parts of documents’ to which the PSI Directive would not be applicable on data protection grounds.
- to add a reference to the Supervisory Authority set up by Article 51 of the GDPR under Article 4(4) of the Proposal, in order to further enhance the link between the re-use of public sector information and the protection of personal data.
- to re-introduce the specific provision on applicable data protection law currently contained in Article 1(4) of Directive 2013/37/EU in the substantive part of the Proposal (including the necessary update of references to the legal instruments currently in force).
- to further point out to the use of anonymisation in the context of the reuse of public sector information by including a reference to ‘anonymous information’ in the legal text and extending the scope of the entities entitled to include anonymisation costs within the costs that can be charged to reusers.
- to clearly state in the Proposal that the definition of ‘personal data’ according to Article 4(1) of the GDPR applies.
- to provide for data protection impact assessments, for specific sectors dealing with sensitive data, such as the health sector, on which the licensor should base its decision and consequently take into account the conditions for re-use.
- As a last comment, in putting forward these recommendations, the EDPS stresses the data protection-relevance of the following ‘key principles’, that according to the Commission should be respected in the context of data re-use, namely:
 - (i) Minimised data lock-in and ensure undistorted competition;
 - (ii) Transparency and societal participation on the purpose of the reuse *vis-à-vis* the citizens/data subjects as well as transparency and clear purpose definition between the licensor and the licensees;
 - (iii) Data protection impact assessment and appropriate data protection safeguards for reuse (according to a ‘do no harm’ -under the data protection viewpoint- principle).

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