



Policy paper on the review of the PSI Directive

January 2018

Introduction

In 2003 the [Directive 2003/98/EC on the reuse of public sector information](#) (2003 Directive) came into effect and obliged EU Member States to make information and resources that they produce and collect reusable to the greatest possible extent.

In 2013 the 2003 Directive was amended by [Directive 2013/37/EU](#) (2013 Directive). The 2013 Directive made [several important changes](#), including:

1. all legally public sector documents became subject to reuse (“reusable by default”),
2. museums, archives, and libraries (including university libraries) were covered under the directive,
3. any fees for acquiring PSI were limited to marginal costs of reproduction, provision and dissemination, and
4. documents and metadata were to be made available for reuse under open standards and using machine readable formats.

From 19 September 2017 to 12 December 2017 the European Commission conducted a [public consultation on the review of the PSI Directive](#) (2017 PSI Review). This review could lead to further positive changes that will lead to an even greater opening of public data to the possibilities of their re-use by all interested parties.

Previous position papers on the PSI Directive:

- [COMMUNIA policy paper on the reuse of public sector information in cultural heritage institutions](#) - November 2014
- [COMMUNIA policy paper on proposed amendments to PSI Directive](#) - January 2012

Our Assessment

Despite the directive being in force for 14 years, it is still far from achieving the objectives set in it. There are still considerable differences in the rules and practices in the Member States related to the exploitation of PSI resources. In particular we believe that further harmonisation of national access regimes among the Member State and further alignment among EU legal instruments should be especially considered for better fulfillment of the PSI Directive goals. More of our remarks regarding the PSI Directive can be found in the

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[questionnaire prepared](#) in connection with the public consultations process (2017 PSI Review). The Commission promises to take into account the consultation outcome in the context of the review of the PSI Directive. Here are our recommendations to strengthen access and reuse of PSI, if the Commission opens the PSI Directive for amendment.

Recommendations

COMMUNIA advocates for policies that expand the public domain and increase access to and reuse of culture and knowledge. For this reason materials from the public domain, or held by cultural heritage institutions, research and educational establishments are located in the center of our interest.

1. Data held by educational and research institutions (publications, data research) should be included in the scope of PSI Directive

In the 2017 PSI Review, the Commission asked questions about whether documents¹ held by educational and research establishments, schools and universities—which are currently exempt from the scope of application of the PSI Directive—should be made available for reuse.

In our opinion these documents (save for those necessary to preserve an individual's privacy, commercial confidentiality and legitimate rights of third parties etc.) held by educational and research establishments, schools and universities should become available for reuse with as few restrictions as possible.

Of course, it could be worthwhile to share documents of an administrative nature—especially in support of transparency and public accountability—assuming that any privacy considerations have been properly addressed.

Clearly, the higher value documents to make subject to permissive reuse rights regimes would be those of a scientific nature. In its very essence this type of information is meant to be shared, both to aid research efforts across institutions, promote cross-sector collaboration, and also for education and teaching purposes. The argument for sharing these types of documents and data sets becomes stronger when these resources are developed through the use of public funding.

The results of publicly funded scientific research (and the data to back it up) should be made available under permissive open licenses (such as [CC BY](#)), or even put into the worldwide public domain using a tool like the [CC0 Public Domain Dedication](#). This means that researchers, scientists, doctors, patients, and the public around the world will get

¹ The questionnaire outlined two distinct sets of documents, including 1) those of an administrative nature such as budgets, enrolment of students, human resources, and 2) those that constitute the scientific output of a research establishment or university.

the access they deserve and need in order to be informed on current scientific research, learn about promising medical innovations, and collaborate to solve problems.

Having immediate open access to the outputs of publicly funded scientific research will contribute to the goals of the EU's Horizon 2020 programme. According to its [guidelines document](#), improving access to scientific publications and data helps to: “1) build on previous research results (improved quality of results), 2) encourage collaboration and avoid duplication of effort (greater efficiency), 3) speed up innovation (faster progress to market means faster growth), and 4) involve citizens and society (improved transparency of the scientific process).” In addition, the Horizon 2020 programme Model Grant Agreement already requires that grantees must ensure open access to all peer-reviewed scientific publications—meaning that “any scientific peer-reviewed publications can be read online, downloaded and printed.” It should go further to require that reuse rights be granted to both publications and associated datasets, by requiring that permissive open licenses be applied at the time of publication.

Therefore, we recommend that scientific research results resulting from public funding should be made available under a permissive reuse rights regime. However, the Commission should ensure that policy efforts to improve access to publicly funded scientific research are complementary—and not in conflict with—each other.

2. Ensure that all documents that are not covered by third party intellectual property rights are available for reuse

According to the 2013 Directive documents held by cultural heritage institutions are within the scope of the Directive only if: (i) they are in the public domain, either because they were never protected by copyright or because copyright has expired; or (ii) the cultural heritage institution is the original right holder or assignee of the intellectual property rights.

However, the reuse obligations deriving from these two situations are not the same. For (i) documents that are in the public domain the general rule applies: documents must be reusable if they are generally accessible (Art. 3(1)). In the different case of (ii) documents for which the institution holds the copyright and/or related rights the derogatory rule of Art. 3(2) applies: the institution can decide whether it wants to allow reuse or not. Nonetheless, if reuse is allowed it must follow the general requirements of transparency and nondiscrimination, as well as the specific limits on the charging policy. Consequently, documents whose intellectual property rights belong to third parties, but a specific copy thereof is held by a cultural heritage institution are excluded from the Directive, as confirmed by Recital 22 and Art. 1(b) of the consolidated version, and accordingly there is no obligation to allow reuse.

Unfortunately, Recital 9² of the 2013 Directive introduces some uncertainty. It might be interpreted as implying that any documents held by a library, museum, or archive, but originally owned by a third party and whose term of protection has not yet expired is a document for which third parties hold an intellectual property right, and therefore is excluded from the scope of the Directive. This reading seems contrary to the provisions established in Article 3 (consolidated version) and contradicts the overall objectives and principles enshrined in the Directive (to open up public knowledge for reuse).

As we argued in [COMMUNIA policy paper on the reuse of public sector information in cultural heritage institutions](#), Member States should implement the 2013 Directive in line with the principles established in Article 3 (consolidated version) and ensure that all documents that are not currently covered by third party intellectual property rights fall within the scope of PSI national legislation. Unfortunately, not all Member States have implemented the directive this way.³ This, in our opinion, creates barriers that hinder the reuse of public sector information held by cultural heritage institutions across the EU.

Therefore we recommend to revise the Directive to ensure that all documents that are not currently covered by third party intellectual property rights fall within the scope of PSI national legislations.

3. Codifying open licensing as a standard mechanism for sharing public sector information

The recitals of the [2013 revised PSI Directive](#) and 2014 [guidelines on recommended standard licences, datasets and charging for reuse of documents](#) put a lot of emphasis on the use of standard open licenses. It especially concerns documents that are still protected by intellectual property rights but where these rights are held by the cultural heritage institutions that have these works in their collections. Unfortunately, there is no direct requirement in the Directive itself obliging PSI providers to license materials under these standardised open licenses.

We've [argued](#) that PSI should be shared as a part of the global public domain using the [CC0 Public Domain Dedication](#), with the second best route is using standard, permissive open licensing (such as [CC BY](#)). A positive aspect the updated 2013 Directive is the narrowing of the language around acceptable licensing for PSI by removing the text

² "Taking into account Union law and the international obligations of Member States and of the Union, particularly under the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade Related Aspects of Intellectual Property Rights, documents for which third parties hold intellectual property rights should be excluded from the scope of Directive 2003/98/EC. If a third party was the initial owner of the intellectual property rights for a document held by libraries, including university libraries, museums and archives and the term of protection of those rights has not expired, that document should, for the purpose of this Directive, be considered as a document for which third parties hold intellectual property rights"

³ [Poland is an example](#), where only documents held by cultural heritage institutions are possible to reuse only if they are in the public domain, either because they were never protected by copyright or because copyright has expired. The remaining resources, even if the institution owns the copyright, have been excluded from reuse.

encouraging the development of additional open government licenses. And the July 2014 guidelines mentioned above was a welcome addition to the licensing discussion, as it recommended standardized, open licenses such as CC 4.0, CC0, and other Open Definition-compliant licenses. These open licensing recommendations should be codified within the text of the Directive itself, or made mandatory in some other fashion.

There could still be barriers to adoption and use of standardised open licensing for PSI. For example, on <https://www.europeandataportal.eu/>—the website that “harvests the metadata of Public Sector Information available on public data portals across European countries”—users can explore datasets available under dozens of licensing options. In fact, upon recent investigation, there were 99 licenses listed, ranging from “cc-by,” to “OGL 2.0” to “Etalab Open License,” among many others. There are a few challenges with this this expansive list. First, it’s obvious that the European Open Data Portal website is indexing “open data” available under customized, non-standardised licenses, such as the “Vlaamse Open Data Licentie”—which seems to contain over 3200 data entries. Second, there are several license names that do not represent any specific license choice at all—for example the listings “notspecified” (8900 entries) or “other” (1700 entries). These types of choices will simply confuse prospective data reusers, or may prompt those users to ignore those entries altogether. Finally, there are several license namings that could possibly be referring to the same open license, but which are spelled differently, and thus are broken into separate listings. For instance, there are several separate listings that may be referring to the CC0 Public Domain Dedication, but which are named “cc-zero” (8200 entries), “cc-0” (3600 entries), and “CC0 1.0” (600 entries). In order to promote maximum reuse of PSI, this licensing metadata should be cleaned up, and harmonised for future additions to the portal.

Therefore we recommend the Commission codify their earlier guidelines on recommended standard licences for PSI, and also ensure accurate licensing metadata across PSI and open data portals that reflects these licensing options.

4. Charging for reuse

The 2013 Directive states that public sector bodies can only charge users for the costs incurred. This makes sure that public sector bodies will not make profit out of their activities. This is based on the idea that public sector information is generated by public money. It would therefore be unreasonable to ask the taxpayers to pay twice. Reuse is more likely to occur when there is no financial barrier for the users to use documents.

CHIs have been included in the scope of the Directive because these institutions have resources on which added value can be built for the public benefit. The Directive also states that libraries, museums, and archives are explicitly allowed to charge above marginal cost, but charges “should not exceed the cost of collection, production, reproduction, dissemination, preservation and rights clearance, together with a reasonable return on investment.” This enables cultural institutions (CHIs) to generate revenue beyond simple cost recovery. This enables CHIs to charge for cultural heritage resource that have already

entered into the public domain. These cultural heritage institutions enjoy significant flexibility in setting fees for re-use of cultural resources, possibly by restricting access to cultural resources.

Works made available for reuse by cultural heritage institutions that are publicly funded should be available at the costs incurred similar to the public information bodies. It does not make sense that these CHIs can charge fees at a different scale than other PSI bodies seeing that they have similar tasks in providing access to publicly funded resources with minimal restrictions.

Any (additional) fee for reuse will severely limit the scale of reuse. CHIs have the objective to give access to culture and information to a wide and varied audience. It is therefore contradictory to create additional barriers to works that were made available for reuse by CHIs.

Therefore we recommend to revise the Directive to ensure CHIs and public sector bodies that are alike in their aims and funding structure can only charge at the costs incurred. We emphasise the importance of suitable state funding for CHI which will also enable them to make as many resources reusable as possible.

Conclusion

While the Commission has made great strides with improving access to and reuse of public sector information in Europe, there's now another opportunity to update the PSI Directive to make it maximally useful and impactful. If the Commission decides to amend the directive, we believe that it should address the following policy recommendations: 1) It should mandate that scientific research results resulting from public funding should be made available under a permissive reuse rights regime, 2) It should ensure that all documents that are not currently covered by third party intellectual property rights fall within the scope of PSI national legislations, 3) it should codify its guidelines on permissive standard licences for PSI, and 4) it should ensure CHIs and public sector bodies that are alike in their aims and funding structure can only charge at the costs incurred.

About COMMUNIA

The [COMMUNIA International Association on the public domain](#) is a network of activists, researchers and practitioners from universities, NGOs and SME established in 10 Member States.

COMMUNIA advocates for policies that expand the public domain and increase access to and reuse of culture and knowledge. We seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.