

ON PRIVACY AND PERSONAL DATA PROTECTION AS REGARDS RE-USE OF PUBLIC SECTOR INFORMATION (PSI)*

by

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PSI Directive contains some references to the Data Protection Directive, confirming that fundamental rights of privacy and data protection should be respected in cases re-use of personal data would be allowed. However, these references are vague and not enough to avoid poor harmonization of the PSI Directive throughout Member States and inconsistent usage between public bodies. This document suggests that the review of PSI Directive should introduce more references to data protection obligations and rights. First, the European Commission should review it in the light of the EDPS' Opinion of April 2012 and, secondly, the Article 29 Working Party is the right arena to discuss such questions, as it deals with ensuring uniform interpretation of the data protection issues between authorities of the different Member States.

KEYWORDS

PSI, Data Protection, Privacy, Re-use of personal data, Transparency, Reform of the Data Protection legal framework

1. PRELIMINARY QUESTIONS

The public sector collects, produces, reproduces and disseminates a wide range of information in many areas of activity, such as social, economic, geographical, weather, tourist, business, patent and educational information (Recital 4 of Directive 2003/98/EC¹, hereinafter 'PSI Directive'). A great amount of these information can be considered as 'personal data' following

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the provisions of Article 2 (a) of Directive 95/46/EC² (hereinafter 'Data Protection Directive'), which states that the term 'personal data' "*shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity*". This implies that when personal data is to be re-used, provisions of both legislations have to be applied.

PSI Directive makes reference to the data protection rules in the following Articles: Recital (21), Article 1 (4) and Article 2 (5). Following these provisions, and taking into account that the Data Protection Directive already provides the legal framework for the processing of personal data, our first conclusion was that there is no real need to review these articles of the PSI Directive, as it already guarantees the respect of data protection principles by making clear references to the Data Protection Directive. However, we were invited to give assistance to the European Commission within the process of future revision of PSI Directive within the European Thematic Network on Legal Aspects of Public Sector Information (hereinafter 'LAPSI')³ that created different working groups⁴.

Indeed, in practice, we noted that some Member States have transposed the PSI Directive as regards the data protection aspects either by imposing the total "anonymization" of personal data before allowing the re-use of data (e.g. PSI Belgian Law⁵) or by obtaining a previous "formal consent" from data subjects. Some other Member States have imposed a mix of both solutions, as well as a third solution: a legal text must allow the re-use of personal data owned by a public body (e.g. in France and in Slovenia). Where these solutions are not introduced, another possibility is also the obligation to obtain prior authorization from the National Data Protection

¹ See Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, *Official Journal of the European Union* L 345, 31/12/2003, P. 90-96.

² See 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, *Official Journal* L 281, 23/11/1995 P. 0031 – 0050. We should stress that the Data Protection Directive is currently also under the process of revision.

³ See goals, members, outputs and any relevant information about LAPSI project on its official website: <http://www.lapsi-project.eu/>

⁴ A Working Group 2 about "Privacy Aspects of PSI between Private and Public Law" was created during 1st LAPSI Thematic Seminar of 7th and 8th October 2010 in Leuven. This paper is a synthesis of the Policy Recommendation n°4 issued by WG2 members at the end of LAPSI project (for a complete version, please consult: <http://www.lapsi-project.eu/policy>).

⁵ See Article 4 of the Belgian Law of 7 March 2007 on re-use of PSI (*Loi du 7 mars 2007 transposant la directive 2003/98/CE du Parlement européen et du Conseil du 17 novembre 2003 concernant la réutilisation des informations du secteur public*, M.B. 19.04.2007).

Authority (hereinafter 'DPAs'). Such different approaches have hampered the development of possible markets for information and have created a heterogeneity in Member States' practices, which also brings greater legal uncertainty for possible "transborder re-users" of personal data. These disparities could be avoided by further references to data protection obligations and rights within the provisions of the new PSI Directive.

2. INTEREST INVOLVED

2.1. OBJECT: MARKET AND DEMOCRACY

Although the PSI Directive clearly aims to increase the potential of the European internal market and to favour the development of the European "content industry"⁶, as well as to extend the "right to knowledge" as a basic principle of democracy⁷, we have to take into account the right to data protection and respect of privacy, since they are fundamental human rights that arise from different European legal instruments⁸ and from the extensive case-law of the European Court of Human Rights (ECHR)⁹ and the European Court of Justice (ECJ)¹⁰. Therefore, it is important to respect the data protection rules when personal data are processed, even for the purpose of developing the market for the re-use of PSI. As the former wording¹¹ of PSI Directive did not even impose the re-use of PSI as an obligation to Member States and public bodies, within that legal framework the re-use of PSI could not even be considered as a "right" by itself. As a result, it was not easy to make a clear "balancing test"¹² between both "rights" in order to achieve a satisfactory proportionality balance of interests in the application of both Directives when personal data were at stake. On the contrary, Recital (21) of the PSI Directive corroborated the fact that we had to respect data protection legislation entirely in cases of re-use.

⁶ See Article 13 (2) and Recitals (1), (5) and (25) of PSI Directive.

⁷ See Recital (16) of PSI Directive.

⁸ See European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 8) (ECHR); Charter of Fundamental Rights of the European Union (Articles 7 & 8); Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention n°108) of the Council of Europe; etc.

⁹ See the European Court of Human Rights' case law concerning the protection of personal data on: <http://hub.coe.int/en/data-protection/>.

¹⁰ See relevant case law on: <http://fra.europa.eu/en/theme/data-protection-privacy>

¹¹ See Recital (9) and Article 3 of PSI Directive.

¹² The word "balance" suggests a balance between two rights of equal value while one is dealing here with a fundamental right (privacy) and a kind of policy (re-use of PSI) that has not even been granted the status of an individual right (which would in any case not be as strong as a fundamental right).

However, the new version of the European Commission's proposal for amending the PSI Directive introduces the principle of a "re-use of PSI right"¹³, which would create further confusions for the application of both legislations. It will certainly be useful to have further case law of the European Courts in order to understand how to manage both issues whether the European Parliament and the Council accept this new version of the PSI Directive¹⁴.

2.2. SUBJECTS: PSI PRODUCERS, HOLDERS, USERS AND RE-USERS

On the one hand, the position of PSI producers and/or holders has to be taken into account. Public bodies and institutions collect vast amounts of personal data (e.g. citizens' identity data, marital status, health data, social data, etc.) and produce, reproduce and disseminate it in order to fulfil their public tasks in public interest. From the Data Protection Directive's standpoint, public sector bodies must be considered as "first controllers"¹⁵ of personal data. Therefore, they are obliged to comply with all the provisions of this Directive and ensure all data subjects'¹⁶ rights. On the other hand, from the perspective of users or potential re-users of public sector information, which often comprise personal data, successful re-use can imply gaining information related to specific individuals, most notably in cases where it is crucial to learn more about public officials' activities. Re-use of personal data, as well as all other information, is therefore a key to increase the value of democratic participation of citizens, civil society associations and non-profit organizations. Obstacles to free access to and re-use of all personal data (not only personal data relating to citizens but also those concerning civil servants/public officials) could very well hamper the "market" for re-use of PSI. Again, the frontier between access to information (which falls under Freedom of Information's regimes of each Member State) and use or re-use of PSI is extremely tight and complicated to define¹⁷. This is linked to

¹³ See European Commission, *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.

¹⁴ See also the EDPS' Opinion quoted below.

¹⁵ Following the provisions of Article 2 (d) of Data Protection Directive, a 'controller' is the "natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data".

¹⁶ A 'data subject' is a natural person who can be identified or is identifiable by any information relating to him/her (see Article 2 (a) of Data Protection Directive that defines what a 'personal data' is).

¹⁷ See also LAPSI Policy Recommendations N°6 on "Rights of Access to Public Sector Information".

the fact that the definition of re-use is not limited only to commercial use of PSI but encompasses also non-commercial re-use.

3. INTERESTS PROTECTED UNDER THE CURRENT LEGAL FRAMEWORK

The former wording of the PSI Directive suggested that the respect of data protection rules is important when developing a market for the re-use of PSI containing personal data. The new proposal for amending the PSI Directive does not change this matter of fact. Indeed, in their quality of data controllers, public bodies still have to respect all the obligations and principles imposed by the Data Protection Directive that is still in force, which are: lawfulness of personal data processing (personal data must be processed fairly and lawfully); proportionality principle (personal data processing must be adequate, relevant and not excessive for the purposes for which they are collected); purpose limitation principle (personal data must be collected only for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes); data quality (data must be accurate and kept up to date when necessary)¹⁸; time of conservation (or retention period) that permits identification of data subjects for no longer than it is necessary for the purposes for which the data were collected (Art. 6 (1)). These provisions seriously limit the possibility of re-using public sector information containing personal data. Indeed, re-users in turn also become data controllers (for the new data processing¹⁹ linked to the re-use) in case the re-use of personal data would be allowed, and should be subject to all obligations and rights of the data protection legislation.

Article 7 of Data Protection Directive also provides limited criteria for legitimate personal data processing. Public bodies (PSI holders) and potential re-users also have to comply with them in their role of controllers, such as: obtaining an unambiguous consent of data subjects; or proving the necessity of the processing for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or proving the necessity for compliance

¹⁸ As provided by Article 6 (2) of Data Protection Directive.

¹⁹ Following the definition given by Article 2 (b) of Data Protection Directive a 'processing of personal data' or 'processing' shall mean "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction".

with a legal obligation to which the controller is subject²⁰; or proving the necessity to protect the vital interest of the data subject; or proving the necessity of the processing for the performance of a task carried out in the public interest²¹ or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or proving the necessity for the purposes of the legitimate interests²² pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1) [of Data Protection Directive].

There are also special categories of data, processing of which is, in principle, prohibited by Article 8 of the Data Protection Directive, such as: personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or data concerning health or sex life (the so-called “sensitive data”). The processing of such data is only permitted in certain cases corresponding to the limited admitted exceptions of paragraphs 2 to 5 of the same Article. Furthermore, it has to be taken into account that data controllers are obliged to provide clear information to the data subjects in order to respect their rights, such as: the right of access to data, the right of rectification, erasure or blocking data when their processing does not comply with the provisions of the Data Protection Directive (Art. 12), and the right to object to personal data processing (Art. 14).

4. POSSIBLE SOLUTIONS IDENTIFIED BY LAPSI WG2 MEMBERS²³

PSI Directive should make more references to obligations imposed by Data Protection Directive in different articles.

²⁰ This is the main criterion that justifies the main personal data processing operations done by the public bodies, which fall within a specific legal framework – the Administrative Law or the Public Law - in some Member States (e.g. in Civil Law systems).

²¹ *Ibidem*.

²² This legal ground could be used by potential re-users when dealing with processing of personal data, and it is the balance of both “legitimate interests” (of the data controller and of the data subject) that will determine the legitimacy of the data processing concerned. However, in this regard we could face different approaches or interpretations by Member States, which would again mean that the harmonization is incomplete and cross-border re-use hindered.

²³ See former version of WG2 Policy Recommendation (January 2012) on: http://www.lapsi-project.eu/wiki/index.php/LAPSI_Policy_recommendations and complete version (September 2012) on: <http://www.lapsi-project.eu/policy>

4.1. ARTICLE 7 (ON TRANSPARENCY):

The current version of Article 7 in PSI Directive recommends that *“any applicable conditions (...) shall be pre-established and published”*, a new one should suggest the establishment of a clear and (when possible) specific “privacy policy” or “information document” by PSI holders.

4.2. ARTICLE 8 (ABOUT LICENCES):

Current version of Article 8 of PSI Directive states that *“public sector bodies (...) may impose conditions, where appropriate through a licence, dealing with relevant issues (...)”*, a new one should remind the respect of privacy principles and obligations in a specific clause when a licence is established by a public body (e.g. about lawfulness of data processing, proportionality and purpose principles, time of conservation, necessity to inform about the data controller, the recipients of the data, etc).

4.3. OTHER POSSIBLE CHANGES:

Further references (e.g. new paragraphs) should be introduced in PSI Directive, such as: the obligation of information of data subjects (when their personal data are requested for the re-use); to the main data protection principles; the levels of anonymization required (or not) when re-use of personal data would be allowed, and the purposes for re-use that are allowed (and under what conditions). Moreover, a clear determination of the responsibility of each “actor” (data controller and data processor in each personal data processing) should also be made by new version of PSI Directive. Finally, if a new re-use of “PSI authority” would be created (as it seems to be the case in the current proposal of review), an additional reference should be made (e.g. by the introduction of a new article) as regards the existence of DPAs and/or other national “supervisory authorities” that already monitor data protection and privacy issues and/or the implementation of other rules (e.g. competition authorities, access authorities, etc), and their existence should at least be taken into account. Moreover, the new proposal should include a specific clause that deals with the “collaboration”/cooperation between those authorities when different issues are at stake (e.g. access and re-use, re-use and competition, re-use and privacy, etc).

5. LEGAL PROBLEMS:

5.1. RULES EXIST BUT ARE UNCLEAR: THERE IS A NEED TO CLARIFY THEM

As it was stressed before, PSI Directive makes clear reference to the Data Protection legislation. However, addressing problems that arise from the re-use of PSI containing personal data has been a great opportunity not so much for modifying the PSI Directive on specific points, but mainly to generate a global debate on the issues related to the “tension” between the use of information held by public bodies and the respect for personal data. The outcome of such a debate could be introduced into the general approach of the PSI Directive. Furthermore, for some members of our working group, there still are different points that deserve more attention by the PSI Directive reviewers.

For some of us, a stronger effort should be made to establish the differences (which are clear from a theoretical perspective but increasingly confused in practise) between: access to public information²⁴, access to personal data²⁵, and access to PSI for re-use purposes²⁶. As re-use of PSI does not always have commercial aims, this characteristic considerably increases some of the already mentioned “confusions” between the different types of “access” to information held by public bodies.

For others, another issue that arises from some national laws transposing PSI Directive in this field is that there are also problems in defining what “anonymization” is and how far it should go. And what is the “common meaning” of this word (if there is one). This is certainly a challenge, as sometimes some information could be “formally anonymised” (and therefore Data Protection Directive does not need to be applied²⁷), but it could not be enough to avoid further identification of individuals (e.g. some kinds of geographic information combined with other data could allow specific identification of people). Anonymization is a more technical problem and a

²⁴ This is provided by the national Freedom of Information (FOI) Acts.

²⁵ This should fall under the provisions of the data protection legislation (data protection national laws transposing the Data Protection Directive).

²⁶ This is provided by the national laws transposing the PSI Directive, referring to Data Protection legislation when PSI contains personal data.

²⁷ In fact, Recital (26) of Data Protection Directive states that: “Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible”.

functional concept. A legislator cannot strictly state what anonymization is (in a technical sense) and how it should be realized, but should require it (or a specific kind of it), for instance, for specific categories of personal data²⁸. We could suggest the way of anonymization as the “default rule” for personal data collected by public bodies in order to facilitate processing of such data (including the re-use), but not as a necessary condition for the re-use (as it is done by some Member States PSI legislation), as it goes beyond the rules that the data protection legislation imposes²⁹. It should also be considered that Article 29 Working Party³⁰ (hereinafter ‘Art. 29 WP’) has clarified that “anonymization must be completely irreversible for the Data Protection Directive to no longer apply”³¹. Nevertheless, we are not sure that this solution should be introduced in the PSI Directive rather than in the Data Protection Directive and/or in the national legislations on data protection and re-use of PSI.

Finally, from our main viewpoint, Art. 29 WP is the “right arena” to discuss such questions, as it deals with ensuring uniform interpretation of the Directive between the national data protection authorities (DPAs) of different Member States. In fact, this is a question of application of data protection principles to practice, which is still fairly new. Therefore, Art. 29 WP could allow a discussion grouped around this theme, leading to harmonized interpretations of what are the data protection requirements in the context of re-use. It should also be the moment to adapt and update Art. 29 WP’s working papers (WP) on re-use of PSI that had already been produced, and especially its opinion on the re-use of public sector information and the protection of personal data³² delivered in 2003. This working paper has already stressed some key points that European Commission should take into account³³, which should be updated before by Art. 29 WP.

Furthermore, European Commission should ask Art. 29 WP to give it more clear guidance about some crucial points as stressed therefore.

²⁸ For instance, the Italian legislation prescribes anonymization in some cases (e.g. for the re-use of judicial data for legal information purposes), but without any reference to a generic possible re-use.

²⁹ Indeed, the processing of personal data is not forbidden by the data protection legislation, even for the public bodies, but it should be processed following the respect of different principles (mentioned above).

³⁰ This group was created by Article 29 and following of Data Protection Directive. See its role and competences on: http://ec.europa.eu/justice/data-protection/article-29/index_en.htm

³¹ See Article 29 Working Party, *Opinion 1/2008 on data protection issues related to search engines*, WP 148 adopted on 4 April 2008, §5.3, p. 20.

³² See Article 29 Working Party, *Opinion 7/2003 on the re-use of public sector information and the protection of personal data – Striking the balance*, WP 83 adopted on 12 December 2003.

³³ Please refer to the complete version of our Policy Recommendation, as mentioned before.

5.1.1. THE RESPECT OF THE PURPOSE PRINCIPLE WHEN RE-USE OF PERSONAL DATA IS ALLOWED:

In principle, re-users are not obliged to justify why they require the data, but in the case of re-use of personal data and in order to be compliant with the Data Protection Directive this is an essential requirement to fulfil. This mentioning of the purpose of the intended re-use is necessary to assess the character compatible or not of this purpose with regard to the initial purpose of collection of the data. Generic re-use is not a compatible purpose, but the re-users should declare the specific re-use purpose³⁴, in order to permit the controller (e.g. the public administration) to allow that specific re-use. One should distinguish when access to personal data is possible, when it is allowed for further use (as for journalistic or historical reasons, for instance), and when it could be allowed for possible re-use (and then the purpose principle applies for the new data processing).

5.1.2. THE RESPECT OF THE PRINCIPLE OF PROPORTIONALITY WHEN RE-USE OF PERSONAL DATA IS ALLOWED:

Prior information of the PSI holder ("first data controller") to data subjects about the purpose of data processing in case of the re-use is also an essential requirement in order to know whether the principle of proportionality is respected (such respect could be controlled either by the first collector/"owner" of the data – the public authority, or by the DPAs – when the notification of the re-use processing is done³⁵, or even by the data subject himself, for instance). As mentioned before, this principle imposes that personal data processing "must be adequate, relevant and not excessive for the purposes for which they are collected and/or further processed" (Article 6 (c) of Data Protection Directive).

³⁴ First, when they make the request of re-use before the PSI holder/public administration body, but also when the data have not been directly obtained from data subjects: the "new" data controller (the re-user) should also provide information to the data subjects, except when "the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law" (see Article 11 of Data Protection Directive).

³⁵ Following the provisions of Article 18 of Data Protection Directive, there is an obligation to notify the supervisory authority (DPA) "before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes". Such notification must contain specific details including, between others, "the purpose or purposes of the processing" (Article 19 (1) (b) of Data Protection Directive).

5.1.3. THE RESPECT OF THE OBLIGATION OF DATA SUBJECTS' INFORMATION: SHOULD IT BE "INDIVIDUAL" OR COULD IT BE ONLY "GENERAL"?

This obligation could be respected by the public body by providing a clear "privacy policy" in its website, which could give the information of the possibility of re-use of the data processed. This information could be, if appropriate in a Member State, implemented as a complementary measure of the previous "assessment" done by each DPA, for instance. However, the "second" data controller (the re-user) should in turn put in place its own system of information of data subjects' rights for the new data processing of the re-use³⁶.

5.1.4. OBTAINING THE FORMAL CONSENT OF DATA SUBJECTS (WHEN RE-USE OF PERSONAL DATA IS ALLOWED BY PUBLIC BODIES) AND CURRENT TECHNICAL POSSIBILITIES OF "PRIVACY BY DESIGN" WITHIN PUBLIC SECTOR DATABASES AND REGISTRIES:

Could it be possible to provide a kind of "opt-in"³⁷ system by the way of the public body website, for instance, or by obtaining this consent (preferably in writing) at the moment of the first collection of the data (when possible)? However, we have to warn that probably not all national legislations would allow public sector to transmit personal data to re-users on the basis of personal consent³⁸. Public sector databases and registries could also include a kind of technical system that would help public bodies to anonymize personal data after the storing time of their first processing in order to automatically allow re-use of these data after this anonymization. This solution should meet the national legislations that already impose total anonymization of identities (e.g. Belgium), but the questions still remain whether it is technically feasible and would it allow a kind of "interoperability" between systems. These two examples of privacy by design could be completed or changed by other tools following the "sensitivity" of the personal data concerned. Art. 29 WP should first make such an assessment at pan-European

³⁶ As it is imposed by the provisions of Article 11 of Data Protection Directive.

³⁷ Some LAPSI partners doubt that an "opt-out" system (which is opposite to prior consent – opt-in) could be considered as a possibility in this case; opt-out could only be possible if there is a legal basis for processing (re-using) in the first place and then the individual would have the possibility to forbid the processing of its personal data.

³⁸ Slovenia did not have such a case, but it is questionable if this would be allowed, because processing of personal data on the basis of personal consent in public sector is very limited.

level and then, possibly, each DPA should make “case-by-case” assessments in order to meet all national legal specificities.

5.1.5. THE RESPECT OF THE QUALITY OF DATA:

As mentioned before, the system of licences provided by Article 8 of PSI Directive could be a good tool to reinforce data protection by PSI holders and further re-users, as well as to help them to clearly define responsibilities of the data controllers. One should also take into account that at the national level some Member States set out other supervisory authorities in the field of access to public documents (like the CADA in France) and/or for re-use of PSI (as the authority of “appeal” of re-use of PSI practices, like in Belgium), therefore both authorities should collaborate in order to avoid disparities of solutions and opinions³⁹. In other Member States, as in Slovenia, the PSI Directive has been implemented in the Access to Information Act, where there is only one “supervisory authority” competent for both access and re-use complaints (and for personal data protection as well).

5.2. RULES EXIST BUT ARE NOT FUNCTIONING: NEED TO CHANGE RULES

Our main objective, within the LAPSI WG2 network, was to rightly determine the requirements that are imposed by data protection and privacy rules on the re-use of PSI and to identify possible problems that such requirements could cause. On the one hand, data protection rules should not be used as a “mere excuse” by public bodies to excessively restrict the re-use of PSI (when it implies personal data), when there is a legal basis for processing of personal data. On the other hand, we have to take into account situations where data protection provisions are necessary and welcome to protect individuals’ rights in the wide information content market. In this project, our aim was to address the impact data protection rules may have on the re-use of PSI and identify possible problems (like excessive blocking solution in Belgium, for instance) and large differences in interpretation of these requirements by authorities in different Member States. All

³⁹ Or maybe the “access supervisory authority” should refer the case to the “data protection authority/DPA” when personal data are at stake, to avoid discrepancies of decisions/opinions. In France, for instance, in the case of re-use of personal data of public registries, the CADA Authority (authority on access of public documents) referred the case to the CNIL (French DPA). See CNIL’s Recommendation: “*Délibération n°2010-460 du 9 décembre 2010 portant recommandation relative aux conditions de réutilisation des données à caractère personnel contenues dans des documents d’archives publiques*” (available on: <http://www.cnil.fr/en-savoir-plus/deliberations/deliberation/delib/250/>).

this led us to propose that finding a solution at European level to reduce these differences is crucial for the development of the re-use market.

Changing PSI Directive provisions regarding data protection issues is not the only solution: initially, European Commission should rather address the problem of “bad transposition” of PSI Directive by Member States as regards re-use of personal data information provisions. Then, PSI Directive reviewers should also consider the role of National Data Protection Authorities at national level, which could play an important role of advisors and/or regulators when there is a need to re-use personal data.

6. RULES ARE CHANGING: IN WHAT WAY?

One crucial point that we have already stressed is that the Data Protection Directive and PSI Directive are under review process since the end of 2011, and it would be important to associate both revisions in this field. Unfortunately, it seems that it is not the case, as we can see on last versions issued by European Commission that still circulate for review:

6.1. THE OPEN DATA STRATEGY FOR EUROPE:

On 12 December 2011 the European Commission has issued a proposal to review the PSI Directive⁴⁰ within its ‘Open Data Strategy for Europe’⁴¹ Policy. The new version of the PSI Directive proposes changes about the subject matter and the scope of the Directive⁴², about a new “general principle” in the sense that a “right of re-use” of PSI has been created (under certain conditions), etc. However, no improvements on data protection issues have been proposed and articles on that matter have not been changed, improved or clarified at all.

6.2. THE REFORM OF DATA PROTECTION LEGAL FRAMEWORK:

On 25 January 2012, the European Commission launched a proposal for a “General Data Protection Regulation”⁴³ in order to replace the Data Protection Directive in force since 1995. This paper does not want to do a specific

⁴⁰ European Commission, *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/98/EC on re-use of public sector information*, op. cit..

⁴¹ European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Open data: an engine for innovation, growth and transparent governance*, COM(2011)882 final.

⁴² For a deeper analysis of this proposal see: JANSSEN K., *European Public Sector Information Platform, Topic Report No. 2012 / 3: The amendment of the PSI directive: where are we heading?*, published on April 2012.

analysis of the entire proposal, but aims to begin a discussion on issues related to the re-use of PSI. Then, despite the fact that the European legal framework on data protection would become more binding for the Member States⁴⁴, such proposal still does not tackle the “re-use of PSI” issue. In fact, new definitions and principles have been introduced or specified (such as the data minimisation principle⁴⁵, the transparency principle⁴⁶, the principle of accountability⁴⁷, etc), further conditions have been established (for consent to be valid as a legal ground for lawful processing, or the controller's information obligations towards the data subject), and new «actors» have been created (such as the data protection officers⁴⁸/DPOs, the new ‘European Data Protection Board’ which would replace the Art. 29 WP⁴⁹, etc). However, the process of revision is ongoing and it is unclear which further changes could be introduced by the new General Data Protection Regulation or another legal instrument⁵⁰.

6.3. THE EDPS OPINION ON THE OPEN-DATA PACKAGE:

Finally, on 18 April 2012, the European Data Protection Supervisor (EDPS) issued a new Opinion on the “Open-Data Package” including the Proposal amending the PSI Directive⁵¹. This opinion has quoted the work done by the LAPSI WG2 in the previous version of our policy recommendation and has raised further issues that this Recommendation did not take into account due to the fact that the process of developing this Recommendation has begun in 2010. Therefore, we recommend that the European Commission, in a

⁴³ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, Brussels, 25.1.2012, COM(2012) 11 final, 2012/0011 (COD).

⁴⁴ Instead of several national laws to transpose the Data Protection Directive, there should be only one Regulation with the same provisions for all, which would avoid disparities between legal frameworks on one hand, but would increase “tensions” between Member States as their national specificities would not be taken into account, on the other.

⁴⁵ See new Article 5 of the Data Protection Regulation.

⁴⁶ E.g. new Article 11 which introduces the obligation on controllers to provide “transparent and easily accessible and understandable information”, inspired in particular by the Madrid Resolution on international standards on the protection of personal data and privacy (adopted by the International Conference of Data Protection and Privacy Commissioners on 5 November 2009).

⁴⁷ New article 22 takes account of the debate on a “principle of accountability” and describes in detail the obligation of responsibility of the controller to comply with this Regulation and to demonstrate this compliance, including by way of adoption of internal policies and mechanisms for ensuring such compliance (see page 10 of the Data Protection Regulation).

⁴⁸ See new Article 35 of the Data Protection Regulation.

⁴⁹ See new Article 64.

⁵⁰ To follow the review, please consult: http://ec.europa.eu/justice/data-protection/review/actions/index_en.htm

⁵¹ EDPS, *Opinion on the ‘Open-Data Package’ of the European Commission including a Proposal for a Directive amending Directive 2003/98/EC on re-use of public sector information (PSI), a Communication on Open Data and Commission Decision 2011/833/EU on the reuse of Commission documents*, 18 April 2012.

new version of the proposal for amending PSI Directive, should refer more to the EDPS opinion as it tackles different problems raised by the new version of the Directive. In particular, the Commission should take into account that the new “right of re-use” principle would increase data protection issues even more. Hereafter, we outline the EDPS recommendations that should be, in the opinion of LAPSI WG2, especially taken into account by the European Commission and the reviewers of the PSI Directive.

6.3.1. THE APPLICABILITY OF THE PRINCIPLE OF RE-USE OF PERSONAL DATA SHOULD BE CLARIFIED AND MADE SUBJECT TO ADDITIONAL CONDITIONS:

The EDPS recommends, among others, that the new Article 1(2)(c) should be amended and that the notion of ‘protection of privacy and personal data’ should be specifically mentioned among the examples of possible grounds for exclusions from access regimes (point 36, p. 7). The EDPS also recommends that the Proposal should specify that before a public sector body makes personal data available for the re-use, it should carry out an assessment (also called «data protection impact assessment») to decide whether the personal data involved can be made available for re-use (Point 40).

6.3.2. ON THE PARTIALLY ANONYMIZED AND/OR AGGREGATE DATA:

The EDPS stresses that they may also include personal data, therefore adequate levels of anonymization should be ensured, unless the previous data protection impact assessment has established that the personal data may be made available (Points 43 to 46). Moreover, the EDPS stressed that an exception for costs of anonymization should be taken into account in the article on charges (Points 61 to 65)⁵².

6.3.3. ON LICENSING :

The EDPS refers to our idea and stresses that a data protection clause should be included in the license terms, when available, and that the re-user should demonstrate how the risks are addressed and that (binding) purposes for re-use should be clearly mentioned in such a license (Points 49 to 56). EDPS also refers to the Art. 29 WP as the right actor to obtain further

⁵² This issue has been also addressed by the LAPSI Policy recommendation n°1 on “The Competition Law issues of the re-use of PSI”.

guidance on anonymization and licensing (Points 66 and 67) and regrets that « *he has not been consulted on the draft Decision before its adoption* » by the European Commission. We warmly recommend to the European Commission to consider this EDPS Opinion as well as our policy paper before adopting a new revised version of the PSI Directive, in order to improve the respect of the data protection principles in the re-use of PSI market.

In conclusion, we should stress that it is important to put in relation the revision of PSI Directive and of Data Protection Directive at the European Commission level by both “reviewers”, before any new version of these directives. We warmly recommend to the Commission to consider this advice, even more in the light of the recommendations issued by the EDPS. At least, making more references to data protection rules in other articles of the PSI Directive could clearly remind which actors and/or rights are concerned by interaction of both directives. Art. 29 WP should also be sought before any new proposal to revise PSI Directive.