

STRUCTURE AND PROPORTIONALITY OF FUNDAMENTAL RIGHTS IN PSI RE-USE*

by

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This recommendation is about legal regulatory framework of fundamental rights involved in the re-use of public sector information and about the method of implementation of these rights in secondary EU law. It is particularly focused on subsidiarity and proportionality of EU law and the ways in which the differences in understanding of mutual balance of fundamental rights with regards to PSI re-use on the level of EU, CoE and in Member States, affect the efficiency of the Directive.

KEYWORDS

public sector information, re-use, proportionality, subsidiarity, fundamental rights

1. INTRODUCTION

Developing any legal regulatory framework is always a matter of mutual balancing of fundamental rights as well as balancing of fundamental rights and public interests. This policy recommendation contains an overview of these rights and interests including links to policy recommendations that elaborate on them in particular. It is assumed that there is no general classification of fundamental rights and public interests and that their mutual conflicts have to be assessed on an ad hoc basis.

With the adoption of the Treaty of Lisbon, complete structure of fundamental rights has been acknowledged as an integral part of primary EU law. The jurisdiction of the Court of Justice then joins already existing jurisdictions of ECHR and national supreme and constitutional courts of the Member States, so this policy recommendation identifies and describes the issue that is referred to as “Bermuda triangle,” i.e. the situation when there exist

* This text was originally published as the LAPSI WG 6 policy recommendation, redrafted to the date of 21 October 2012.

three relatively independent regimes of the protection of fundamental rights. Consequently, legal issues of fundamental rights might be now simultaneously decided by three relatively independent instances. Diversities in these cases are likely to occur due to the fact that the understanding of mutual balance of fundamental rights and of the balance between fundamental rights and public interests is different on the level of EU, CoE and in the Member States and often arises from cultural differences.

In order to tackle the above issues, this document offers three main recommendations, i.e.:

- 1) to treat proportionality of the Directive apart from its subsidiarity, i.e. to specifically assess and reason the purpose of EU regulatory action (i.e. the subsidiarity of the Directive) and the scope of particular provisions (i.e. the proportionality of particular rules).
- 2) to particularly analyze conflicting fundamental rights in PSI re-use, to subsequently identify diverse approaches to these rights arising from cultural diversity among the Member States and
- 3) to exclude strict provisions in the Directive that relate to these diversities, i.e. to leave the issue of mutual balancing of fundamental rights and of balancing of fundamental rights and public interests in these cases for the inter-institutional discourse between the CJEU, ECHR and supreme judicial institutions of the Member States.

2. INTERESTS INVOLVED - PURPOSE OF THE DIRECTIVE AND FUNDAMENTAL RIGHTS IN PSI RE-USE

The legal basis (legitimate purpose) of the Directive is primarily grounded in Article 26 of the Treaty on the Functioning of the European Union (TFEU). The development of an “area without internal frontiers in which the free movement of goods, persons, services and capital is ensured” served in this case through Article 114 TFEU as a legitimate legal basis for the adoption of harmonization measures for re-use of public sector information throughout the EU.

The core teleology of the Directive, i.e. the development of internal market through the harmonization of rules for re-use of public sector information is based on the following assumptions:

- 1) data represent key element in the knowledge economy (e.g. recital, paragraph 3)

- 2) public sector produces data that, if made available for re-use, represent large economic potential (e.g. recital, paragraph 5)
- 3) state-of-the-art information and communication technologies provide for extensive tools for processing and utilizing digital data including public sector information (e.g. recital, paragraph 4), and that
- 4) unified transparent regime for re-use of public sector information among the Member States will multiply positive economic effects of re-use of public sector information (e.g. recital, paragraph 6, 7, 8). Disparities in the laws of Member States hinder the development of an internal market for PSI based products and services.

The primary aim of the Directive is to create an economically functional legal environment for transparent and non-discriminatory use of those public sector information that is made available for further fructification¹. It implies that, out of the three general aims of law, i.e. fairness, certainty and utility (economic efficiency)², the core teleology of the Directive is primarily based on economic efficiency. It does not mean that the Directive may not bring other than economic positive effects, but that the economic efficiency of the internal market basically justifies its mere existence.

It was not the primary aim of the Directive to promote non-economic social or political benefits. If any positive social effects were originally predicted or supported by the directive, like the enhancement of fundamental informational rights (right to knowledge, freedom of research etc. – e.g. recital, paragraph 16) or common goods (transparency and efficiency of public institutions,)), they are to be tackled as accompanying effects to the primary economic benefits³. However, it does not mean that other than economic effects should be disregarded or neglected – although they do not primarily legitimate the mere existence of the Directive, they significantly contribute to the development of democratic information society⁴.

¹ For detailed discussion of economic factors in PSI re-use, see Position Paper No. 1 „Principles governing charging“ for re-use of public sector information.

² See Radbruch, G. 1957, *Der Mensch im Recht: ausgewählte Vorträge und Aufsätze über Grundfragen des Rechts*, Vandenhoeck & Ruprecht, Göttingen, p. 88.

³ The primary focus of pan-European economic efficiency is typical not just for public sector information but for EU law in general – see for example Trächtman, J. *L'Etat, C'est Nous*. 1992, 'Sovereignty, Economic Integration and Subsidiarity', *Harvard International Law Journal*, vol. 33, no. 2, p. 459-473.

⁴ See para. 16 of the recital: „Making public all generally available documents held by the public sector – concerning not only the political process but also the legal and administrative process – is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy. This objective is applicable to institutions at every level, be it local, national or international“ or Position Paper 4: The „Licensing“ of public sector information, p. 3.

In its recently conducted impact assessment study, the Commission identified the following problematic issues in adoption and implementation of the Directive⁵:

- 1) Insufficient clarity and transparency, including practical issues,
- 2) Licensing terms that are restrictive or unclear, or lacking altogether,
- 3) Lack of information on available data,
- 4) Lack of a robust complaints procedure,
- 5) Locked resources,
- 6) Excessive charging and lack of a level playing field, including attempts by public sector bodies to maximise cost recovery, as opposed to benefits for the wider economy,
- 7) Unfair competition practices between the public and the private sector,
- 8) Incoherent approach within and across the Member States,
- 9) Ineffective enforcement mechanisms.

All above points derive from extensive analysis of practical (in)efficiencies of the recent implementation and application of the Directive. They prevent the Directive from establishing functional (i.e. comprehensive, efficient, transparent and predictable) market of public sector information and of its derivatives⁶. Consequently, all the problems mentioned above represent constraints or limitations whose removal is desired in order to make the Directive work. That is desirable with regards to the main teleology of the Directive (i.e. of economic efficiency), but also with respect to a multitude of consequent social benefits, i.e. transparency of public sector, development of non-profit social services etc.

Apart from aforementioned constraints, there is a need to consider another factor that represents serious risk to the efficiency of the Directive, i.e. the compliance of the Directive and its implementations with primary EU law, constitutional law and international law. If, for example, re-use regulations provide for rights or remedies that might be (even theoretically) challenged in front of the Court of Justice, national constitutional instances or in front of the European Court of Human Rights, it can lead not just into the implicit lack of their theoretical legitimacy, but also into very particular uncertainty as to their mere practical application. That means substantial con-

⁵ See SEC(2011) 1552 final, p. 8.

⁶ The overview of the current market situation is given in WG 1 Policy recommendation on the competition law issues of the re-use of public sector information, p. 3.

straint to particular business projects and initiatives due to the lack of predictability of law.

Taking into account that superior rules (primary EU law, constitutional law of the Member States, public international law) are to a large extent defined upon fundamental rights, it is of crucial importance to focus on the compliance of the Directive and its subsequent requirements with their recent discourse. In order to analyze and discuss the ways in which the EU PSI re-use addresses the protection of fundamental rights, there is a need to first identify those fundamental rights that are most important with the respect to the re-use of PSI. Although the following list is not exhaustive, it provides for a structure of fundamental rights within which there exist most of recent legal issues arising from PSI re-use. The purpose of the following list is not to explain what fundamental rights are or should be tackled by the Directive, but to rather point out which fundamental rights are to be in general taken into account with regards to the re-use of PSI:

Freedom of information or freedom of access to information (in some languages translated as “right for information” or “right to access information”) – this right has been identified by the project team as highly important for PSI re-use, yet the most controversial⁷. Its doctrinal understanding as well as its interpretation greatly differs among various jurisdictions⁸. Some of Member States consider it only as access right towards public institutions, while other doctrines use it as common denomination for broad variety of individual information rights including rights to receive, create, process and disseminate various kinds of information. Consequently, when used in broader sense, freedom of information might contain also rights related to the freedom of expression, freedom of press, freedom of scientific research and even freedom of thought or freedom of religion⁹.

Right to privacy (incl. right for private and family life) - this right forms an integral part of a set of individual information rights commonly denominated as rights for information self-determination¹⁰. Unlike in the case of

⁷ See Birkinshaw, P. 2010, *Freedom of Information – The Law, the Practice and the Ideal*, Cambridge University Press, Cambridge, p. 30 or Balkin, J. M. 2004, *Digital Speech and Democratic Culture: a Theory of Freedom of Expression for the Information Society*. New York University Law Review, vol. 79, no. 1, p. 1-55 or Borgman, C. 2003, *From Gutenberg to the global information infrastructure*, MIT Press, Cambridge, p. 63.

⁸ See also WG6 Recommendation No. 2 on Rights of Access to Public Sector Information, p. 10.

⁹ See for example Balkin, J. M. 2004, *Digital Speech and Democratic Culture: a Theory of Freedom of Expression for the Information Society*. New York University Law Review, vol. 79, no. 1, p. 1-55.

¹⁰ The complex term „right for information self-determination“ has been first used by the German Constitutional Court in its decision No. BVerfGE 65, 1, of 15-12-1983, publ. on-line at www.thm.de/datenschutz/images/stories/volkszaehlungsurteil_bverfger_1983.pdf.

freedom of information rights, the international understanding of the scope and definition of the right to privacy are now relatively settled. Thus, it is possible to work now among various jurisdictions with relatively unified terminology and concerted understanding as to the scope and relevance of this right¹¹. It is to be noted that the right to privacy consists not just of its passive fundament (i.e. of the right for protection of private sphere), but also of its active component, i.e. of the right to actively communicate incl. the right to access services of information society assuming that private life does not include only discretionary private sphere, but also private forms of social interaction.

Right to the protection of personal data – deriving originally from the right to privacy, the right to the protection of personal data aims to specifically protect one element of individual personal integrity, i.e. data related to an individual person. However, the scope, method and procedures of protection of personal data substantially differ from the protection of privacy¹². Unlike in the case of privacy protection, personal data are objectively defined and the basic protective method is primarily grounded in administrative law. Also unlike in the case of privacy protection, there is complex EU legal regulatory framework for the protection of personal data¹³.

Right to property – the right to property represents one of core elements of European legal culture¹⁴. However, when assessing its role and relevance, there is a need to clearly distinguish between the standard property rights, i.e. tangible and intangible property, and intellectual property. Unlike in the case of movable and immovable property, intellectual property is neither significantly grounded in the European legal history, nor it has fully settled as to the structure and use of various protective instruments. Apart from historical differences, there are also no solid rational, social, ethical or eco-

¹¹ The development of internationally concerted understanding of the content of this right was driven also by the case-law of the European Court of Human Rights - see for example ECHR no. 13710/88 (Niemietz v. Germany) no. 5029/71 (Klass et al. v. Germany, no. 9248/81 (Leander v. Sweden), no.11801/85 (Kruslin v. France), no. 23224/94 (Kopp v. Switzerland), no. 44787/98 (P. G. and J. H. v. UK), no. 30562/04 and 30566/04 (S. and Marper v. UK), no. 28341/95 (Rotaru v. Romania) and others. Recently, this right is being tackled in the light of highly controversial issue of data retention – see for example de Vries, K. Bellanova, R. De Hert, P., Gurwith, S. The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't it?), in Gutwirth, S., Poulet, Y., De Hert, P., Leenes, R. (eds.), 2011, Computers, Privacy and Data Protection: An Element of Choice, Springer, Heidelberg, p. 3.

¹² See Schwartz, P.M. 2004, 'Property, privacy, and personal data', Harvard Law Review, vol. 117, no. 7, pp. 2055-2128 on page 2069 or Kuner, C. 2003, European Data Privacy Law and Online Business, Oxford University Press, Oxford, p. 55.

¹³ See WG 2 Recommendation on and Personal Data protection, p. 1.

¹⁴ See Glenn P. 2004, Legal Traditions of the World, Oxford University Press, Oxford, p. 125 or Wood, A. 2008, Kantian Ethics, Cambridge University Press, Cambridge, p. 85.

nomical grounds for equalizing those two categories¹⁵. Consequently, the role and relevance of intellectual property and (standard) property have to be considered independently, whereas the PSI re-use agenda works namely with the intellectual property rights¹⁶.

Right to conduct business – acting in favour of free business activities, this fundamental right is often a subject to the assessment against rights of privacy, freedom of speech etc.¹⁷ The right to conduct business is often not directly defined by fundamental sources of black-letter law, but it is applied as a consequence either to the right of property or to the right to work (or both). The right-to-property-based interpretation of the right to conduct business derives from philosophical position that sees the entrepreneurship basically as a property of economically usable tools. It is then considered as a property right of the owner of these tools not to be disturbed in using them in order to gain economic benefits. On the contrary, the right-to-work-centered approach to the freedom to conduct business focuses on the freedom to choose the occupation including the freedom of self-employment. Regardless of what are the grounds for the recognition of the freedom to conduct business in national legal systems, this fundamental right plays an important role in the re-use of PSI. It relates to quantitative (antitrust) protection of the PSI market¹⁸, state-subsidized commercial activities relating to PSI as well as to the qualitative protection of fair competitive business environment¹⁹.

Right to equal treatment – this fundamental right represents one of core principles of law in general²⁰. It derives from very grounds of human-centered system of law and is based on the assumption that all human beings deserve the same treatment with respect to their rights and duties. However, practical applicability of this principle might become problematic when it comes to the question of so-called criteria of distinction. It is there-

¹⁵ The fact that the right to the protection of intellectual property is now recognized as a part of the structure of fundamental rights (incl. Its expressis verbis presence in fundamental constitutional documents) does not mean that its relevance or forms of protection shall be the same as in the case of tangible property. See Lessig, L. 2004, Freeculture. The Penguin Press, New York.

¹⁶ See the Position Paper 4: The “Licensing” of public sector information, p. 9.

¹⁷ See for example Fundamental Social Rights: Case-Law of the European Social Charter, Strasbourg: Council of Europe, 2002, p. 13 or ECHR case No. 25181/94 (Hertel v. Switzerland).

¹⁸ These rights are elaborated in detail in WG 1 Policy recommendations on the competition law issues of the re-use of public sector information.

¹⁹ This includes also the protection of valuable information like trade (business) secrets – see WG 6 Policy recommendation regarding the interface between the protection of commercial secrecy and the re-use of public sector information.

²⁰ For comparative approach, see for example Rabe, J. 2001, Equality, affirmative action, and justice, Books on Demand, Nordstedt, p. 163 or Smith, R. K. M. 2007, Textbook on International Human Rights, Oxford University Press, Oxford, p. 235.

fore not that difficult to legislatively provide for equal treatment for various sorts of subjects, but it might be often difficult to specify what features make these subjects equal in the light of the applicable law. In the PSI re-use agenda, the right to equal treatment becomes emerging namely with respect to distinguishing among PSI re-users and among public bodies.

Public interests – although public interests (public goods) do not represent per se fundamental rights, they are to be recognized as equally relevant to them²¹. Acknowledging the crucial relevance of public interests is reasoned not just by natural teleology of public institutions, but also by the fact that the level of protection of public interests consequently affects the level of protection of fundamental rights of individuals - only functioning public institutions (i.e. those that have enough powers and resources) might be efficient enough in promotion and protection of individual fundamental rights. In the area of PSI re-use, the most emerging public interests are namely economical effects *lato sensu* incl. GDP, employment, development of the internal market, more efficient use of public funds etc. followed by various positive social effects incl. the development of information society, enhancement of scientific progress, environmental protection, protection of public health etc²². While these interests act in favour of greater level of PSI re-use, other public interests that are to be considered as well, might act contrary to that, namely the protection of public economic or political interests (by, for example, the secrecy of some economic information), and the protection of public security.

The above enumerated fundamental rights and public interests get often into mutual conflicts. For example, freedom of information contradicts with the right to the protection of personal data whenever there are some personal data contained in the PSI²³, public interests in economic and social development might often contradict with the property rights etc. The leading European doctrine in assessing the conflict of fundamental rights is the doctrine of balancing of rights. Primarily developed for general assessment of

²¹ See for example Kiesling, J. H. 2000, *Collective Goods Neglected Goods*, Singapore: World Scientific Publishing, p. 29 or Sheraing, C., Wood, J. 2003, 'Governing Security for Common Goods', *International Journal of the Sociology of Law*, vol. 31, p. 212 or Solms, S. H. 2009, *Information Security Governance*, Springer Media, New York, p. 23 or Reich, P.C., Weinstein, S., Wild C., Cabanlong A.S. 2002, 'Cyber Warfare: A Review of Theories, Law, Policies, Actual Incidents - and the Dilemma of Anonymity', *European Journal of Law and Technology*, vol. 2, no. 1, p. 31.

²² See for example WG6 Recommendation No. 2 on Rights of Access to Public Sector Information, p. 3.

²³ See examples in WG 2 Recommendation on and Personal Data protection, p. 4.

conflicts of legal principles by R. Alexy²⁴ and subsequently by R. Dworkin²⁵, this doctrine that was implemented into Article 51(1) of the Charter nowadays offers practically usable method for the resolution of hard cases (complicated interpretational issues) of conflicting fundamental rights and has been in numerous cases practically adopted by national supreme judicial institutions, ECJ as well as by the ECHR.

3. SUBSIDIARITY AND PROPORTIONALITY OF EU LAW WITH RESPECT TO FUNDAMENTAL RIGHTS

It is to be noted that this text uses the terms “subsidiarity” and “proportionality” in their meanings in the doctrine of EU law²⁶. Consequently, they are referred to as principles of co-existence of EU law in relation to national legal regulatory framework of the Member States.

By their definitions, the principles of subsidiarity and proportionality are relatively simple. They have been explicitly present as key principles of European integration since the middle of 70ies²⁷ and they reflected the nature of the European Communities as primarily cooperative international entity²⁸. While the principle of subsidiarity relates namely to the scope of the regulatory activities, the principle of proportionality limits the availability of particular institutional competences²⁹.

In the words of the applicable primary black-letter law, the EU level of lawmaking is appropriate in cases where, apart from areas where the EU has exclusive competences, the “objectives of the proposed action cannot be sufficiently achieved by the Member States³⁰.” At the same time, the exercise of regulatory competences of EU institutions shall not exceed the limits as to what is “necessary to achieve the objectives of the Treaties³¹.”

²⁴ See Alexy, R. A. 2004, *Theory of Constitutional Rights*, Oxford University Publishing, New York, p. 44.

²⁵ See for example Dworkin, R. 1974, 'Non-Neutral Principles', *The Journal of Philosophy*, vol. 74, no. 14, pp. 491-506.

²⁶ See for example Craig, P., de Burca, G. 2011, *EU Law: Texts, Cases and Materials*, Oxford University Press, Oxford, p. 168 or Harbo, T. I. 2010, 'The Function of the Proportionality Principle in EU Law', *European Law Journal*, vol. 16, no. 2, pp. 158-185.

²⁷ See for example Schultze, R. 2009, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford University Press, New York, p. 243 or Van Kersbergen, K., Verbeek, B. 1994, 'The Politics of Subsidiarity in the European Union', vol. 32, no. 2, *Common Market Law Review*, pp. 215-236.

²⁸ See Bermann, George A. 1994, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', *Columbia Law Review*, vol. 331, pp. 332-456 or Inman, R. P., Rubinfeld D. L. 1998, 'Subsidiarity and the European Union', NBER Working Paper No. 6556.

²⁹ See for example Toth, A.G., 1992, 'The Principle of Subsidiarity in the Maastricht Treaty', *Common Market Law Review*, vol. 29, pp. 1079-1105.

³⁰ See Article 5(3) of the Treaty on European Union.

³¹ See Article 5(4) of the Treaty on European Union.

The principles of subsidiarity and proportionality are not directly related with the concept of fundamental rights. They do not apply to individual rights, but rather to structural relations between different levels of social regulatory mechanisms³². Consequently, there is theoretically no direct relation between the discourse in fundamental rights and the discourse in structural situation between regulatory bodies of EU and of the Member States. In other words, greater unification or greater loosening of regulatory and executive competences of the EU should theoretically be of no significance as to the structure and content of fundamental rights.

However, as pointed out above, the structure and content of fundamental rights is primarily resulting from immediate understanding of their mutual balance. The decision as to the right mutual relevance of various fundamental rights is always made in specific historical, social, cultural and economical circumstances. It is then crucially important for the mere content of fundamental rights what circumstances are taken into account for that discourse. Consequently, it can make substantial difference if the balance between fundamental rights is considered from the pan-European perspective or if it is made on the level of a Member State or even on lower levels (regions, municipalities etc.)³³. For example, it might substantially differ as to the above circumstances if a conflict between freedom of expression and right to privacy is considered by the Court of Justice, European Court of Human Rights, constitutional court of a Member State or even by a district court in some European region (moreover, it would probably make significant difference if that district court would be located in some district of Spain, Finland or Bulgaria).

The Directive clears the issue of subsidiarity by stating that “the objectives of the proposed action, namely to facilitate the creation of Community-wide information products and services based on public sector documents, to enhance an effective cross-border use of public sector documents by private companies for added-value information products and services and to limit distortions of competition on the Community market, cannot be sufficiently achieved by the Member States and can therefore, in view of the intrinsic Community scope and impact of the said action, be better achieved at Community level.” The specific value of harmonized pan-European regu-

³² See Bermann, George A. 1994, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', *Columbia Law Review*, vol. 331, pp. 332-456.

³³ See Maccormick, N. 1997, 'Democracy, Subsidiarity, and Citizenship in the European Commonwealth', *Law and Philosophy*, vol. 16, no. 4, pp. 331-356.

latory approach to re-use of PSI is emphasized also in the Proposal, whereas the main objective of the proposed changes is reasoned by a need “to facilitate the creation of Union-wide products and services based on PSI, to ensure the effective cross-border use of PSI for value-added products and services, to limit distortions of competition on the Union market, and to prevent the deepening of disparities among Member States in dealing with the re-use of PSI.”

Compared to the issue of subsidiarity, the issue of proportionality is tackled relatively briefly in the Directive, in the Proposal and in the accompanying Impact Assessment. All the aforementioned documents are based on the assumption that the need of unified EU-level regulatory approach that reasons the subsidiarity of the regulatory action also implies the implicit proportionate need for the exercise of the competences of EU. This assumption, however, is not entirely correct with regards to fundamental rights.

The issue of proportionality with regards to fundamental rights is in this case closely related to extraordinarily complicated problem of substantive and institutional plurality of the protection of fundamental rights in Europe³⁴. The situation where the protection of fundamental rights is defined by at least three materially equal regulatory regimes, i.e. EU, CoE and national laws, generates unique substantive and institutional discourse. None of the aforementioned regulatory frameworks is ultimately supreme to one another and consequently, institutional background of each of the three above regulatory levels is working in relative independence on one another. Theoretically, it is possible to have one matter diversely decided by a national constitutional court (or similar superior national instance), Court of Justice and European Court of Human Rights, while each of such decisions might be final and irreversible. This situation is referred to as the European Bermuda triangle and results into substantial uncertainty as to the interpretation of basic balance of fundamental rights³⁵.

It is obviously neither the aim nor the ambition of this policy recommendation to resolve the substantive or institutional plurality (or multi-centricity) of the protection of fundamental rights in Europe. However, the fact that there is neither unified nor certain regime of the protection of funda-

³⁴ See Carozza, P. 2003, 'Subsidiarity as a Structural Principle of International Human Rights Law', *The American Journal of International Law*, vol. 97, no. 1. pp. 38-79.

³⁵ See Pernice, I. Kanitz, R. 2004, *Fundamental Rights and Multi-Level Constitutionalism in Europe*, WHI-Paper 07.

mental rights has to be pointed out especially with regards to the issue of proportionality of the EU law, because it implies that, simply said, proportionality of EU law cannot be directly implied from its subsidiarity.

If the substantive and institutional plurality in approaching of the balance of fundamental rights is not respected in any of participating regulatory regimes, it might result into institutional conflicts similar to those that arose with the data retention³⁶. In that case, the EU regulatory action was taken without acknowledging the fact that the EU-level of the assessment of the mutual balance of fundamental rights (or of fundamental rights and public interests) in this case differs from national understanding of such a balance in some of the Member States³⁷. As a result, supreme instances in these Member States were forced to declare their diverse opinions on the balance of fundamental rights upon which the EU-level regulatory action (or its subsequent national implementations) practically lost its primary regulatory effect³⁸.

However, the problem of institutional plurality with regards to the protection of fundamental rights is not critical³⁹. As Europe is in its social and political grounds relatively coherent, substantial differences as to the assessment of balance of fundamental rights relate only to exceptional issues that arise from particular cultural differences. Therefore, there is for example no difference among the Member States as to the balance of fundamental rights with regards to the capital punishment, but there are differences in the same kind of assessment as to the abortions or euthanasia.

In the light of the above facts, it is important for the assessment of subsidiarity and proportionality of any EU regulatory action to identify not just the fundamental rights at stake, but also to map areas where their mutual balance (or their relations to public interests) might be understood differently in different Member States. Whenever these differences of cultural diversity among the Member States arise, they have to be considered as serious factual limit to proportionality of EU law and need to be addressed ac-

³⁶ See for example Crump, C. 2003, 'Data Retention: Privacy, Anonymity, and Accountability Online', *Stanford Law Review*, Vol. 56, no. 1. pp. 191-229.

³⁷ See for example Haggerty, K. D., Samatas, M. 2010, *Surveillance and Democracy*, Routledge, London, p.152.

³⁸ See for example de Vries, K. Bellanova, R. De Hert, P., Gurwith, S. The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't it?), in Gutwirth, S., Poulet, Y., De Hert, P., Leenes, R. (eds.), 2011, *Computers, Privacy and Data Protection: An Element of Choice*, Springer, Heidelberg, p. 3 or Feiler, L. 2010, 'The Legality of the Data Retention Directive in Light of the Fundamental Rights to Privacy and Data Protection', *European Journal of Law and Technology*, vol. 1, no. 3.

³⁹ See for example WG6 Recommendation No. 2 on Rights of Access to Public Sector Information, p. 16.

cordingly. In that sense, it is crucially important to identify cases when the EU-level of understanding of mutual balance of fundamental rights (i.e. the understanding that is generated by democratic discourse within EU institutions) substantially differs from particular members states. Typical examples of such situations include cases of mutual balance between privacy, access rights or intellectual property rights.

The following parts of this recommendation will focus on the ways in which fundamental rights involved in re-use of public sector information are protected under the current EU regulatory framework and on areas where subsidiarity and proportionality of EU law with regards to the protection of fundamental rights might be challenged.

4. FUNDAMENTAL RIGHTS ADDRESSED IN THE DIRECTIVE

As noted above, the structure of fundamental rights that naturally form the background of regulatory framework of PSI re-use include:

- Freedom of information
- Right to the protection of privacy
- Right to the protection of personal data
- Right to property
- Right to conduct business
- Right to equality

This chapter provides for a summary of ways in which the above fundamental rights are now being tackled by the Directive and/or by other components of PSI-related *acquis*.

Freedom of information or Freedom to access information - The provisions of the Directive do not include any specific duties as to mere making of PSI available for the re-use. Therefore, the freedom of information *stricto sensu* is being protected on the EU-level only in general by Article 42 of the Charter focusing only on EU institutions and then by particular provisions of national laws of the Member States. These national provisions differ greatly among each other as to their scope, requirements and institutional backing. Consequently, there is at the moment neither any common understanding nor concerted practices among the Member States as to the general scope and content of freedom of information.

As to the particular access rights, the current EU regulatory framework covers only environmental information (through Directive 2003/4/EC of the

European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC). Not primarily aimed at access rights, but using access rights as one of its components are the regulatory frameworks of spatial data (Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) and other particular initiatives that are in progress namely with the development of European eJustice portal, e.g. the proposal for the Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers⁴⁰.

4.1 FREEDOM TO CONDUCT BUSINESS AND RIGHT TO EQUALITY

These two fundamental rights are particularly protected by the Directive in the way of straightforward implementing the principle of non-discrimination. The Directive aims at creating transparent and non-discriminatory regulatory environment for PSI re-use by implementing strict ban on the adoption of new exclusive agreements into the Article 11(1). Article 11(3) then provides for compulsory invalidity of exclusive agreements that were made before the Directive came into effect. The only exception to the principle of non-discrimination, i.e. the only exception with regards to the ban on exclusive agreements, is allowed in Article 11(2) upon factual conflict with public interests.

Despite of the fact that the ban on exclusive agreements represents one of relatively very few particular strict rules of the Directive, its recent practical effects are disputable. The study that was carried out by the European Commission in accordance with the Communication (COM/2009/0212 final) on the application on Re-use of Public Sector Information – Review of Directive 2003/98/EC – for Belgium, Austria, Czech Republic, Denmark, Poland, Spain, Italy, France and Germany showed that although the Member States have harmonized their national laws with the anti-discriminatory provisions of the Directive, there is evident lack of efficient enforcement.

⁴⁰ The question of whether and eventually in what form should the freedom of information be expressly legislated in the Directive is being tackled in particular in WG 6 Recommendation No. 2 on Rights of Access to Public Sector Information, p. 20.

4.2 RIGHT TO PRIVACY, RIGHT TO THE PROTECTION OF PERSONAL DATA

The Directive does not focus on privacy protection. Instead of that, the Directive makes references to the regulatory framework for the protection of personal data. Paragraph 21 of the recital points out that the Directive should be implemented and applied “in full compliance with the principles relating to the protection of personal data,” whereas Article 1(4) reads in the way that the Directive shall not affect in any way “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 out in Directive 95/46/EC.”

In that respect, it might be found a bit disputable to which extent does the Directive in fact affect existing particular protective rules. While the recital speaks about compliance with “principles,” Article 1(4) mentions neither principles, nor rules, but “level of protection.” However, taking into account the basic teleology of the Directive, it is relatively clear that the purpose of Article 1(4) is to prevent the Directive from acting as *lex posterior* or *lex specialis* in the relation to the existing *acquis* and national laws on the protection of personal data⁴¹.

4.3 RIGHT TO PROPERTY

The right to property is expressly protected by the Directive namely with regards to copyright and *sui generis* rights. The recital uses in paragraph 22 similar wording as in the above case of the protection of personal data saying that “intellectual property rights of third parties are not affected” as well as that the Directive “does not affect the existence or ownership of intellectual property rights of public sector bodies.” However, Article 1(2)(b) of the Directive does not only provide for the sanctity of intellectual property rights of third parties, but directly exempts PSI with third party rights from the scope of the applicability of the Directive. This is disputable not only with regards to the nature of the right to property (i.e. to the fact that it has no a priori priority over other fundamental rights), but also with regards to general diversity as to the understanding of the scope and content of this right. As it was pointed out by the CoE Handbook, “when the European Convention on Human Rights (“the Convention”) was being drafted,

⁴¹ See WG 2 Recommendation on and Personal Data protection, p. 2.

the states were unable to reach an agreement. The formulation eventually adopted by the first Protocol provides a rather qualified right to property, allowing the State a wide power to interfere with that right."⁴²

Compared to another fundamental information right specifically protected by the Directive, i.e. to the above right to the protection of personal data, the effect of the protection of intellectual property rights through the escape clause in Article 1(2)(b) is very different, because any third party intellectual property rights automatically provide for a reason to exempt the respective PSI from the applicability of the Directive and consequent national laws as such⁴³.

5. BASIC LEGAL ISSUES IN SUBSIDIARITY AND PROPORTIONALITY OF FUNDAMENTAL RIGHTS IN PSI RE-USE – THE NEED FOR A LEGISLATIVE ACTION

The new primary regulatory framework of the EU substantially differs with respect to fundamental rights compared to the situation at the time of the adoption of the Directive. The complete structure of fundamental rights is now present in the primary EU law what means that the jurisdiction of EU institutions now implicitly includes fundamental rights to their full extent. Consequently, it is not necessary to explicitly mention fundamental rights as governing regulatory ideas for particular legislative initiatives, because the full structure of fundamental rights is now implicitly present in any secondary legislation through the primary EU law.

It is difficult to assess or even to predict the total effect of the presence of full structure of fundamental rights in primary EU law. In any case, the full presence of fundamental rights in the primary EU law provides the EU and its institutions with materially the same substantive scope of rights and obligations with regards to their protection as it exists at the Member States and at the Council of Europe.

However, the present approach of the EU institutions towards complicated issues arising from balancing of fundamental rights has been relatively modest, especially with regards to the discretion of the Member States. It happens only very rarely that the Parliament, the Council, the

⁴² See Grčić, G., Mataga, Z., Longar, M., Vilfan, A. 2007, The Right to Property under the European Convention on Human Rights, CoE Human Rights Handbooks, No. 10, p. 5.

⁴³ Similarly strict is the exclusion of particular subjects or institutions – see for example the discussion in WG 1 and WG 5 Recommendation as to the issue of the proposed inclusion of cultural and research institutions in the scope of PSI Directive or the analysis in Position Paper No. 3: The Exclusion of “public undertakings” from the re-use of public sector information regime.

Commission or the Court of Justice would strictly and positively set the required balance between fundamental rights and enforce the EU-level of understanding of that balance towards the Member States (one of relatively very rare exemptions is the above referred case of data retention). Rather than that, the EU institutions in most cases leave the decisions as to the very balance of fundamental rights on the Member States. Consequently, the secondary EU law does not in regular cases favour one fundamental right over another and nor does the Court of Justice when deciding on references for preliminary rulings⁴⁴.

For example, the balance between the right to privacy and the right to the protection of intellectual property has never been explicitly addressed by the EU legislation or by the Court of Justice in a way that would favour one or another. Preliminary rulings were mostly issued in the sense that Member States are neither obliged nor prohibited from favouring one fundamental right over another⁴⁵, what practically gives the Member States the opportunity to consider that balance in their own cultural circumstances.

It implies that the respect to locally-specific understandings of the balance between fundamental rights⁴⁶ practically acts on the EU level as a natural limit of the principle of proportionality. Even in cases when the EU-wide unified regulatory approach is found necessary (i.e. the subsidiarity requirements are met), the regulatory actions of EU institutions are often factually limited only to issues that do not strictly affect diverse recent national interpretations of balance between fundamental rights in the Member States⁴⁷.

The above implies a question as to what extent should the secondary EU law (and subsequent statutory law of the Member States) set relations between fundamental rights (or between fundamental rights and public interests) with regards to re-use of PSI. In a situation when the balance between these rights is a matter of permanent social discourse and there still exist fundamental differences between the Member States, strict legislative definition of priority fundamental rights with regards to re-use of PSI might cause the EU institutions to unwillingly enter the above mentioned

⁴⁴ Particular issues of institutional backing of legal regime of PSI re-use are analyzed in WG 6 Policy Recommendation 2 on Institutional Backing of PSI Re-use (Strengthening institutional support of re-use of PSI).

⁴⁵ See for example preliminary rulings in cases C-275/06 or C461/10.

⁴⁶ This can be demonstrated on examples of national approaches to relations between the re-use rights and protection of personal data - see for example WG 2 Recommendation on and Personal Data protection, p. 8.

⁴⁷ See also WG6 Recommendation No. 2 on Rights of Access to Public Sector Information, p. 23.

Bermuda triangle and to face the same results as in other similar cases (like in the case of data retention)⁴⁸.

On the contrary, legislative negligence with respect to the balance of fundamental rights might lead to basic practical uncertainty. Even if particular rules for the re-use of public sector information are defined precisely and certainly, there can be no practical certainty as to their application if it remains unclear how to generally handle situations when, for example, the principle of equality contradicts the right for the protection of intellectual property.

6. POLICY RECOMMENDATIONS

A) PROPORTIONALITY IN THE RE-USE OF PUBLIC SECTOR INFORMATION SHOULD BE CONSIDERED SPECIFICALLY, I.E. APART FROM SUBSIDIARITY.

It is not sufficient to imply the proportionality of EU-level regulatory actions in re-use of public sector information solely from the fact that these regulatory actions meet the requirement of subsidiarity. It implies that not all EU regulatory actions that meet the requirement of subsidiarity are to be automatically taken as proportionate, while the disproportionality might in these cases arise namely from different understanding of balance of fundamental rights.

Moreover, recent institutional framework for the protection of fundamental rights within the EU consists not just of EU regulatory bodies, but also of supreme judicial institutions of the Member States and of the European Court of Human Rights – each of them having ultimate jurisdiction. Consequently, there might simultaneously exist contradictory views on the proper balance of fundamental rights at the EU, at the Council of Europe and in each of the Member States. Such contradictions can consequently cause substantial inefficiencies in the implementation of EU regulatory framework and can critically harm its overall practical regulatory impact.

These concerns need to be addressed specifically during the assessment of proportionality (i.e. apart from subsidiarity) of EU regulatory actions namely with regards to their anticipated factual efficiency.

⁴⁸ Another similar issue apart from the substantive laws is the question of institutional backing and positive or negative conflicts of powers – see WG 6 Policy Recommendation 2 on Institutional Backing of PSI Re-use (Strengthening institutional support of re-use of PSI).

B. THERE IS NEED FOR THE IDENTIFICATION OF CONFLICTING FUNDAMENTAL RIGHTS IN PSI RE-USE AND FOR SUBSEQUENT IDENTIFICATION OF DIVERSE APPROACHES ARISING FROM CULTURAL DIVERSITY AMONG THE MEMBER STATES.

The existing inefficiencies of the EU regulatory framework of PSI re-use might be mitigated if there are identified areas where the basic balance of fundamental rights is considered substantially differently in different Member States. Consequently, strict EU regulatory action might be avoided in these cases in order to prevent the PSI regulatory framework from entering the aforementioned Bermuda triangle.

However, the fact that there are recently some differences among the Member States in considering the balance of fundamental rights with regards to PSI re-use or that it is impossible to define the position of the Member States on these issues does not necessarily mean a strict obstacle to the efficiency of EU regulatory framework and consequent constraint to the proportionality of EU law - there is a need to avoid EU regulatory actions only with respect to issues that directly arise from cultural diversity among the Member States.

C. THERE IS NO NEED FOR EXPLICIT PROVISIONS IN THE DIRECTIVE THAT WOULD POSITIVELY OR NEGATIVELY DEAL WITH THE BALANCE OF FUNDAMENTAL RIGHTS IN THE RE-USE OF PUBLIC SECTOR INFORMATION.

The fact that the complete framework of fundamental rights is now present in the primary EU law makes it unnecessary or even counterproductive to explicitly legislatively cover the protection of fundamental rights in the Directive. Moreover, it is questionable whether the presence of strict provisions relating to fundamental rights in the Directive might not even be considered illegitimate with regards to the distinction between primary and secondary EU law. When the complete framework of fundamental rights forms integral part of the primary EU law, there is no legitimate reason to legislate their protection in the secondary EU law.

The absence of specific provisions with regards to the protection of fundamental rights in the Directive would also provide for more flexible means of interpretation by national judicial instances and by the Court of Justice

that would reflect contemporary social and legal discourse. In particular, it seems inappropriate for the black-letter secondary EU law to totally exclude issues related to access rights from the scope of the Directive as well as to strictly exclude the applicability of the Directive to public sector information that contain third-party intellectual property rights.