



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the re-use and commercial exploitation of public sector documents**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. JUSTIFICATION OF THE PROPOSAL

#### *The potential of public sector information<sup>1</sup>*

The digital, knowledge-based economy is a powerful engine for growth, competitiveness and jobs, while at the same time improving citizens' quality of life. This is a central message of the *eEurope 2002 Action Plan "An Information Society for All"* (COM(2000) 330 final). The present initiative concerning the re-use of public sector information is part of the Action Plan and will contribute to its goals in particular in the areas of *eGovernment* and digital content.

Within the exercise of its public tasks, the public sector collects, processes and disseminates huge quantities of information. Financial and business information is collected by Ministries and other public sector organisations. Legal information and administrative information are public sector information *par excellence*. Geographical information, traffic information and tourist information is also collected by public sector bodies at different levels of government.

Citizens and businesses alike can greatly benefit from a good provision of this type of information on the Internet. It will facilitate their communication with the public administrations and can increase their participation in the democratic process. Public sector information is very important for democratic and civic life. Equally, public sector information is a key resource for economic activity and proper functioning of the internal market. By increasing the use of public sector information, it is expected that better quality information will be used by a larger group of citizens and companies and that it will allow them to better take advantage of their rights in the internal market.

Indeed, public sector information also has a considerable economic potential. The new information society technologies have led to unprecedented possibilities to combine data taken from different sources and create added value products and services. Public sector information is an essential basis for many digital information products and could become an important raw material for new services and in particular for the wireless Internet<sup>2</sup>. It is an important asset that can become a key factor in the further development of the content sector, that already has a market size of EUR 433 billion, employing some 4 million Europeans. Content production has given rise to rapid job creation in recent years and can continue to do so. Better conditions for the exploitation of public sector information will therefore boost economic activity and job creation. In addition a better use of public sector information will lead to other benefits for the citizens in the form of a range of added-value information products that the public sector itself cannot provide.

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<sup>1</sup> The rationale and economic importance of this initiative is explained in detail in the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 23 October 2001, "*eEurope 2002: creating an EU framework for the exploitation of public sector information*" COM(2001) 607. This section gives a short overview of the main arguments exposed.

<sup>2</sup> On 20 March 2001, the Commission adopted a Communication entitled "*The Introduction of Third Generation Mobile Communications in the European Union. State of Play and the Way Forward*" COM(2001) 141.

### *A fragmented European market*

The further integration of the European economies and the development of the wireless Internet will lead to an increasing demand for pan-European information products and services (mobile tourist services, European business information services etc). Establishing this type of product based on public sector information is, however, a challenging task. Rules and practices for re-using the information diverge between countries or may simply not be clear. Difficulties in one or two countries can prevent a content aggregator to make a viable European Union-wide product. This has a clear effect on the European market, since uncertainty about the conditions for using the information prevents companies to step into the cross-border exploitation of public sector information. In particular SMEs may be put off, because for them any major investment failure can have consequences for the continuity of the firm. A minimum set of common rules will create conditions for greater certainty and make it easier to establish Union-wide products. It could also facilitate the tasks of the public sector bodies themselves, that are now often burdened with establishing *ad hoc* policies when faced with a request to re-use information.

The difficulties establishing cross-border information services do not only affect the producers of these services, but also have a negative impact on the users. The availability of reliable information services covering, for example, administrative procedures, traffic, investment conditions or the environmental situation across different Member States is a valuable tool for firms operating within the internal market, as well as being important for citizens. The difficulties to exploit public sector information, therefore, have potential negative effects on the internal market as a whole.

### *The choice of legal instrument*

This Directive will ensure that in relation to the re-use of public sector information the same basic conditions apply to all players in the European information market, that more transparency is achieved on the conditions for re-use and that unjustified market distortions are removed. There are several reasons why the Commission is proposing a Directive on the exploitation of public sector information as the most proportionate way of achieving results in this area and why co-ordination between and/or a recommendation to the Member States does not suffice to redress the situation, also in the light of the economic importance of the issue at stake. The present proposed Directive will offer legal certainty for the market players and establish deadlines for changes, while leaving Member States free to choose the precise way in which its provisions would apply adapted to local circumstances. It will provide a clear answer to the internationalisation of information needs and to the pan-European nature of several of the information products and services. It will avoid a piecemeal approach as Member States move ahead in this area at different moments.

Furthermore the absence of action or too limited action in this area may lead to the unpleasant discovery in a few years that there are still considerable barriers to the European Union-wide exploitation of public sector information and that the gap with the US has increased. Previous experience with the 1989 Guidelines<sup>3</sup> issued by the Commission services on the exploitation of public sector information suggests that a non-legislative approach in this area will not lead to the necessary results. In practice these guidelines have had little impact.

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<sup>3</sup> Guidelines for improving the synergy between the public and private sectors in the information market, Luxembourg 1989.

Moreover, pursuing individual infringement cases under the existing Treaty rules (competition rules, non-discrimination rules, rules on the free movement of services) does not on its own offer the certainty required by the whole of the sector in order to make investments in new products and services. They offer a relatively limited remedy and would not necessarily apply in other situations. Furthermore, testing of the boundaries of the existing legal remedies through a series of specific cases will take a long time, in the case of actions in national courts and will be expensive for the companies concerned. At the same time the judicial decisions would not resolve the underlying problem of the divergent rules and practices that exist in the different Member States.

The proposal for a Directive will not negatively affect the possibility for citizens to access the documents at source. It will not change the existing rules for access to documents in the Member States and will maintain the level of protection of personal data under the existing data protection rules.

## 2. CHOICE AND JUSTIFICATION OF THE LEGAL BASE

As highlighted above, diverging or unclear national legislation and/or practices by public bodies hamper a smooth functioning of the internal market for products and services. A minimum of certainty and transparency on the conditions for re-use of public sector information in Europe is missing, which considerably impedes the establishment of cross-border products and services based on public sector information and, thus, the development of a real European information market.

Against this background, this proposal aims to further the objectives of the internal market defined in article 95 of the EC Treaty, dealing with harmonisation provisions aiming at a smooth establishment and functioning of the internal market. To this end, measures - implying regulations, decisions, directives or recommendations - can be adopted following the co-decision procedure (Article 251).

## 3. SUBSIDIARITY AND PROPORTIONALITY

The goals of this proposed Directive are to facilitate the establishment of European information services based on public sector information, to enhance an effective cross-border use of public sector information by private companies for added-value information products and services, to limit distortions of competition on the European market and to avoid that a different pace in the Member States in dealing with the re-use of public sector information will lead to further fragmentation. These goals cannot therefore be sufficiently reached by the individual Member States in view of their intrinsic European scope and impact and can, therefore, best be reached at Community level.

The Directive limits itself to the minimum harmonisation that is needed to pursue these goals. The choice of a Directive as the appropriate instrument to tackle the issues at stake is explained above. It leaves a considerable margin for manoeuvre for the governments but will at the same time help to ease or overcome the main barriers for industry by setting a number of basic principles.

The proposal is, therefore, fully in line with the principles of subsidiarity and proportionality.

#### 4. IMPACT OF IMPLEMENTING THE PROPOSAL

##### *A positive impact on the information market*

Improved possibilities to re-use public sector information based on a harmonised legal framework will foster investment and innovation on the information market through increased certainty and transparency. This can be expected to lead in turn to growth and increased competitiveness of the digital content industry and bring benefits to consumers.

The sheer size of the economic value of public sector information in the European Union shows the potential of this area: this value has recently been estimated at around EUR 68 billion<sup>4</sup>. This is comparable to the size of industries such as legal services and printing. A better use of the economic potential of public sector information will lead to increased activity and job-creation in the digital content industries. Many of these jobs will be created in SMEs.

Looking ahead, the market for mobile content is expected to become substantial. A recent study<sup>5</sup> estimates the European mobile content market size in 2006 at around EUR 19 billion. The study states that attractive public sector information applications and added-value applications based on public sector information can be a key element in developing this emerging services market.

The proposed measures will thus create enhanced opportunities for the content industry in Europe to use public sector information for value-added information products. The challenge for European industry is to fully exploit this opportunity.

##### *The impact of different charging models*

Over the last few years, a series of studies have tried to model and assess the economic impact of more open data policies. The debate has mainly focused on the issue of charging, opposing the low cost model practised in the United States – where charges for re-use of federal government information do not exceed the marginal costs for the reproduction and dissemination - with cost-recovery models used in Europe. Most analyses - on the basis of economic modelling and/or empirical sector-based approach - lead to the conclusion that low-pricing models give the highest benefits for society as a whole<sup>6</sup>. A detailed study into a number of databases exploited by public sector bodies indicates that charging marginal costs for reproduction and dissemination leads by far to the highest economic impact and ‘welfare effects’<sup>7</sup>. It will in particular benefit SMEs and starting companies. An additional advantage over the cost-recovery models is that it also opens up public sector information for citizens.

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<sup>4</sup> “Commercial exploitation of Europe’s public sector information”, Pira International, September 2000.

<sup>5</sup> “Digital Content for Global Mobile Services”, Andersen, 2002

<sup>6</sup> See for example the studies “Welvaartseffecten van verschillende financieringsmethoden van elektronische gegevensbestanden”, report by Berenschot and Nederlands Economisch Instituut for the Dutch Ministry of the Interior, 2001, “Commercial exploitation of Europe’s public sector information”, report by Pira International for the European Commission, September 2000, or the research in the area of geographical information as reported in “The dissemination of spatial data: a North American-European comparative study on the impact of government information policy”, X.R. Lopez, Ablex Publishing Corporation 1998 or the study “Economische effecten van laagdrempelige beschikbaarstelling van overheidsinformatie” (2000) for the ‘Ravi Bedrijvenplatform’ (private sector members of the Dutch Geographic Data Committee).

<sup>7</sup> “Welvaartseffecten van verschillende financieringsmethoden van elektronische gegevensbestanden”, report by Berenschot and Nederlands Economisch Instituut for the Dutch Ministry of the Interior, 2001.

One study specifically takes into account the potential effects on tax-incomes and points out that increased economic activity as a result of lower licence fees for the re-use of public sector information will overall benefit the state finances<sup>8</sup>. An analysis by the UK Treasury<sup>9</sup> in the context of the 2000 Spending review, asks for caution, while at the same time recognising the need ‘to include an incentive structure that ensures that departments, and particularly Trading funds, do not choose to produce a small output at high costs, which they are still able to cover by passing on high prices to buyers. Simple inertia and the desire for a quiet life may be the principal barriers to extending the utilisation of government information, while covering costs’. The Spending Review was the basis for the provision of a set of core government information to re-users without any charges.

The present proposal takes into account that certain public sector bodies depend on the income from the sales of their information resources to finance part of their operations. It does not impose any radical change as to the charging policies. Although it incites Member States to stimulate public sector bodies to adopt the marginal cost for reproduction and dissemination approach where possible, it leaves it to the Member States and public sector bodies to define the charging policies. The proposal thus allows for the full recovery of production and related costs for the production of a document by the public sector bodies involved, including a reasonable return on investment. The only restriction imposed is an upper limit in cases where the public sector bodies make unreasonable profits on the basis of their information resources.

The review of this Directive, foreseen after 3 years of its entry into force, will address in particular the overall impact of the Directive in increasing the availability of public sector information for re-use and its impact on government revenues.

#### *Impact of transparency and equal market conditions*

The issue of charges is just one of the elements addressed by this proposal. Increased transparency and equal market conditions can be expected to have a considerable impact on the possibilities to re-use public sector information<sup>10</sup>. These measures will enhance European Union-wide information services and economic activity based on public sector information, without negatively affecting the income of the public sector bodies concerned. Although the effects of transparency are hard to quantify, clarity and consistency are considered essential conditions for market-development<sup>11</sup>. The same is true for the limitation of monopolistic behaviour: both economic theory and practice indicate that such behaviour can have a considerable negative impact on the development of the information market.

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<sup>8</sup> The study, based on a conservative projection of the market development resulting from lowering the licence fees for the re-use of public sector information, indicates that a more open licensing policy would generate additional tax revenues which would more than offset the lost income from such fees. In the final analysis, it is therefore not an issue of foregone revenues. “Commercial exploitation of Europe’s public sector information”, Pira International, Sept. 2000.

<sup>9</sup> Appendix to the HM Treasury Spending Review 2000.

<sup>10</sup> See the conclusions and recommendations of the study “Commercial exploitation of Europe’s public sector information”, Pira International, September 2000.

<sup>11</sup> “Welvaartseffecten van verschillende financieringsmethoden van elektronische gegevensbestanden”, report by Berenschot and Nederlands Economisch Instituut for the Dutch Ministry of the Interior, 2001.

## *Practical burden on public sector bodies*

The measures in this Directive include provisions that may require a supplementary effort of the public sector bodies concerned. These provisions do, however, not go beyond what could be expected as proper administrative practice.

The general approach of this proposal for a Directive is one that aims at a minimal extra burden on the public sector bodies. Documents can be made available in their pre-existing formats and there is no obligation to create documents or to adapt documents into a different format. Implementing the proposed measures should, therefore, have a limited impact on the Member States public administrations in terms of operational resources.

## 5. RESULTS OF CONSULTATIONS WITH INTERESTED PARTIES

The proposal for a Directive builds on, amongst others, the reactions to the Green Paper on “*Public Sector Information: a key resource for Europe*” (COM(1998) 585), adopted by the Commission on 20 January 1999<sup>12</sup> and the consultations that followed the publication of this Green Paper.

Furthermore, an online consultation was launched to collect comments and reactions from the stakeholders on the contents of a legal instrument. The deadline of the consultation was 21 February 2002. 77 organisations have reacted to this consultation. The re-users (industry) are very positive and clearly indicate in line with earlier comments that a Directive would be the appropriate instrument to tackle the problems. The data-holders express some concerns about the proposal, in particular about the issue of charging, although they often tend to share the view that the conditions for re-use throughout Europe could and should be improved.

## 6. DETAILED DESCRIPTION OF THE PROPOSAL

The proposed Directive follows the basic orientations as expressed by the Commission in its Communication of 23 October 2001 (COM(2001) 607) on the issues of scope, on the leading principle, on fair trading and on a number of practical issues.

### *Aim and Scope (Article 1)*

This directive will apply to documents that are generally accessible, unless they are subject to a specific exception provided for in this proposal.

### *Activities outside the scope of the public task*

In the context of the use of public sector information, public sector bodies may use the same documents in activities linked to their public tasks and in commercial activities outside their public task. The latter involve adding value to information they have collected for specific clients, or developing added-value products for a broad consumer market that build upon the original data gathered within the exercise of their public tasks. Examples of these commercial activities are market surveys based on statistical information or customised weather forecasts based on meteorological data. While the basic information gathered with public money and in the exercise of the public task should be available for re-use, the commercial information products and services derived from that information should not. Nevertheless, in order to

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<sup>12</sup> You will find the replies to the Green Paper and an analytical overview of the replies at the following website: <http://www.cordis.lu/econtent/psi/>.

ensure a level playing field when a public sector body and third parties offer information products and services derived from the same information certain safeguards should apply. In particular, the charges and other conditions associated with the provision of public information for those commercial activities should be the same as those applied to third parties requesting such information (see article 7). The scope of the public task of a public sector body will often be defined by law or by other binding rules in the Member States. In the absence of such rules it should be defined in line with common administrative practice in the Member State in question. This directive does not seek to harmonise the scope of the public tasks assigned by Member States.

### *Intellectual property rights<sup>13</sup>*

The intellectual property rights *third parties* may have on information held by the public sector bodies are not affected by the measures proposed. In many instances information products and services may have been developed by the public sector in conjunction with private sector partners or the intellectual property rights may belong to the employees of public sector bodies. The rights of such third parties are not affected by what is proposed.

The proposal does, however, have an effect on the way the public sector bodies themselves can exercise their intellectual property rights. Whereas the general legal framework in which intellectual property rights subsist and are administered is given at European level by Directive 2001/29/EC<sup>14</sup> on copyrights and related rights in the Information Society and Directive 96/9/EC<sup>15</sup> on the legal protection of databases, this proposal sets reasonable boundaries to the exercise of intellectual property rights by public sector bodies. The proposal does not affect the existence or ownership of intellectual property rights of public sector bodies. It does not remove the protection for intellectual property rights which currently exists, for instance legal remedies against unauthorised re-use and does not take away the possibility to impose conditions on the re-use and, hence, to exclude undesirable forms of re-use through a licence.

The obligations of this Directive shall only apply in so far as the obligations imposed are compatible with the provisions of international agreements on the protection of intellectual property rights, in particular the Berne Convention for the protection of Literary and Artistic works and the Agreement on Trade-related Aspects of Intellectual Property Rights.

### *Data protection*

The proposal for a Directive does not affect in any way the full respect of the existing data protection rules. If, for data protection reasons, the information is not generally accessible it will not be exploitable. This includes the case where specific conditions for consultation of personal data held by public sector bodies exist (for example, the need to prove a legitimate interest for data protection reasons, access limited to certain parts of the information).

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<sup>13</sup> For the avoidance of doubt, the term intellectual property rights refers to copyright and related rights only (including *sui generis* forms of protection). It does not include industrial property rights.

<sup>14</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19.

<sup>15</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20-28.



### *Public service broadcasters, cultural and educational establishments*

In order to avoid any doubts about the question whether public service broadcasters should be considered as 'public sector bodies' within the definition of this Directive, they are explicitly excluded from its scope. This exclusion reflects their particular position which has been recognised in the Protocol attached to the Amsterdam Treaty that recognises their particular position.

More in general, certain public sector bodies in the cultural and educational area merit a special treatment in view of a combination of different factors. The application of the Directive may cause a relatively high administrative burden for them in comparison to the benefits to be gained. Much of their information would anyhow fall outside the scope of the Directive in view of third party copyrights. Finally, their function in society as carriers of culture and knowledge give them a particular position.

### ***Definitions (Article 2)***

The definition that figures in the Directives relating to public procurement has been the starting point for the definition of '*public sector bodies*'. It covers publicly financed or controlled bodies, with the exclusion of state companies.

The definition of '*document*' in the proposal for a Directive - any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) - is a broad definition that reflects the needs of the Information Society. It covers all types of content, varying from audiovisual material to databases, digitised or not. It would, for example, be awkward in the Internet age to make a distinction between the proceedings of a governmental conference and the web-cast of that same conference. A similar definition is also used in the Regulation on the access to the documents of the Institutions that was adopted in 2001<sup>16</sup>.

*'Documents generally accessible'*. The measures facilitating the re-use of public sector information throughout the European Union build upon the existing access rules applied in the Member States. It does not propose changes to these rules. Since the proposal for a Directive builds upon the existing access regimes it will not apply to documents concerning public security, defence, state security and the activities of the state in court proceedings as far as they are not covered by special regimes. Also documents or the parts of documents that contain commercially sensitive information, for example business secrets, will not be addressed to the extent that they are covered by the national access regimes.

If documents are used by public sector bodies for their own information products or services, they are considered to be generally accessible. The mere fact that a public sector body commercialises its information cannot justify the exclusion of this information from the scope of this proposal.

### ***General principle (Article 3)***

Article 3 indicates that if public sector bodies allow the re-use of documents, the conditions in chapters II and III will apply. It does not oblige the public sector bodies to allow the re-use of

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<sup>16</sup> European Parliament and Council Regulation No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001.

specific documents, but Member States are invited to stimulate public sector bodies to make the documents available for re-use.

#### ***Availability (Article 4)***

The aim of this article is to give requesters the possibility to ask for documents in any format or language available (for example different electronic formats) which can considerably help them to process the documents. Electronic transmission is favoured, but given that many of the documents are still paper-based and that not everyone has access or the capacity to use the tools of the information society, paper-based transmission is not excluded. In order to avoid an excessive burden for public sector bodies, the Article foresees that there is no obligation for the public sector body to create or adapt documents into a different format or language. A need to adapt a document may only exist in case part of the document is not generally accessible (that part of the document may have to be separated from the rest of the document to allow the re-use of the parts of the documents that are generally accessible).

#### ***Time and requirements in case a request is rejected (Article 5)***

The Article concerns cases in which prior authorisation is needed for the re-use of the documents. In many cases such an authorisation will not be needed and then the information can simply be taken from the web and re-used.

In order to respect the differences in the national access regimes, a regime is proposed that brings replying times to requests for re-use in line with the timeframes applicable for accessing the information.

#### ***Principles for charging (article 6)***

The control over information in a specific area puts public sector bodies in a position where they can have market power. In the same way as undertakings in a dominant position cannot abuse their market power, public sector bodies should not set their prices arbitrarily and should not charge excessive prices for information that has been established within the public tasks and with public money. However, public sector bodies are entitled to recover the investment made to produce the information. Therefore, this draft Directive proposes principles for charges based on a cost-oriented approach. Where charges are made, the total income from allowing the access to or the re-use of these documents should not exceed the cost of producing, reproducing and disseminating them, together with a reasonable profit margin. In case of a dispute the burden of proof that the charges are cost-oriented is on the public sector body, unless there is such transparent accounting in place as to allow the prospective re-user to verify whether this principle is respected.

This does not of course prevent the public sector body from charging lower prices for the re-use of the document or from not charging at all.

#### ***Non-discrimination (article 7)***

In order to create a level playing field, charges and other conditions for commercial re-use should be non-discriminatory. Similarly conditions should be non-discriminatory for comparable organisations that re-use the information for non-commercial purposes.

Some public sector bodies also carry out commercial activities outside the public task next to their public activities. The charges and other conditions associated with the provision of public information for those commercial activities should be the same as those applied to third

parties requesting such information. If not there is a risk that the public sector body involved could abuse its privileged position to gain a competitive advantage over other market players.

### ***Transparency (article 8)***

This article imposes transparency in the conditions for re-use (charges and other conditions). It can be expected that the conditions for re-use will be published by the body concerned on the Internet, in particular if the documents concerned are published themselves on the Internet. Such transparency allows to ascertain that the rules which are applied are pre-established and objective and thus do not run the risk of conflict with the basic competition policy principles. It thereby creates a more predictable environment for investment decisions and planning by those reusing the information.

### ***Facilitating re-use (article 9)***

Member States shall ensure that standard licence agreements for the commercial exploitation of public sector information are available online, and can be processed online. This does not imply that there will be a European model for these online standard licences. It is up to the Member States to decide about the right level of government to establish these standard licences. In practice each public sector body licensing information could have its own online licence, although a certain standardisation would facilitate the re-use of information for re-users that have to deal with different public sector bodies.

### ***Fair trading (article 10)***

Article 10 limits the possibility for public sector bodies to have exclusive arrangements for the exploitation of public sector information, where the arrangements unjustifiably restrict competition or the commercial re-use of information. Indeed, to the extent that an exclusive arrangement would lead to an abuse of a dominant position by the undertaking that benefits from it and thereby to a violation of the competition rules of the EC Treaty (Article 82 in conjunction with article 86), this Directive reflects the Treaty obligation of removing all unjustified exclusive arrangements.

In some specific cases an exclusive arrangement may however be justified (Article 10.2). Whether a situation justifies exclusivity, and thus whether it does not unjustifiably restrict competition, would be eventually decided on a case by case basis and in application of Article 86 of the Treaty.

## **EC Institutions**

Although this Directive is addressed to the Member States, the rules for the re-use of information resources will also be respected by the Community institutions. Over the last few years main information holders within the institutions, such as the Office for Official Publications and Eurostat have already made considerable efforts to arrive at a transparent and non-discriminatory policy for the re-use of their information resources and will operate in line with the rules expressed in this text.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the re-use and commercial exploitation of public sector documents**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

Acting in accordance with the procedure set out in Article 251 of the Treaty<sup>4</sup>,

Whereas:

- (1) The Treaty provides for the establishment of an internal market and of a system ensuring that competition in the internal market is not distorted. Harmonisation of the rules and practices in the Member States relating to the exploitation of public sector information contributes to the achievement of these objectives.
- (2) The evolution towards an information and knowledge society should influence the life of every citizen in the Community, *inter alia*, by affording new ways of gaining access to and acquiring knowledge.
- (3) Digital content plays a predominant role in this evolution. Content production has given rise to rapid job creation in recent years and continues to do so. Most of these jobs are created in small emerging companies.
- (4) The public sector collects, collates and disseminates information in many areas of activity, such as geographical, tourist, business, patent and educational information.

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<sup>1</sup> OJ C [...], p. .

<sup>2</sup> OJ C [...], p. .

<sup>3</sup> OJ C [...], p. .

<sup>4</sup> OJ C [...], p. .

- (5) One of the principal aims of the establishment of an internal market is the creation of conditions to promote the development of Community-wide services. Public sector information is an important primary material for digital content products and services and will become an even more important content resource with the development of wireless content services. A broad cross-border geographical coverage will also be essential in this context.
- (6) There are considerable differences in the rules and practices in the Member States relating to the exploitation of public sector information resources, which constitute barriers to bringing out the full economic potential of this key information resource. A minimum harmonisation of national rules and practices on the re-use and commercial exploitation of public sector information should therefore be undertaken, in cases where the differences in national regulations and practices or the absence of clarity hinder the smooth functioning of the internal market and the proper development of the information society in the Community.
- (7) Moreover, without a minimum harmonisation at Community level, legislative activities at national level, which have already been initiated in a number of Member States in order to respond to the technological challenges, might result in even more significant differences. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased cross-border exploitation of information.
- (8) A general framework for the conditions of re-use of public sector information is needed in order to ensure fair, proportionate and non-discriminatory conditions for the re-use of such information.
- (9) This Directive should apply to documents held by public sector bodies that are generally accessible. Where public sector bodies allow the re-use of such documents they should be re-usable for commercial and non-commercial purposes under certain conditions. Public sector bodies should be encouraged to make available for re-use any documents held by them that are generally accessible.
- (10) The different formats used by public sector bodies can represent a considerable burden for private organisations that want to re-use information taken from several sources. The need to digitise paper-based documents or to manipulate digital files to make them mutually compatible should be reduced by requiring public bodies to make the documents available in all pre-existing formats.
- (11) The time limit for replying to requests for re-using information resources should be reasonable and in line with the equivalent time for requests to access the document, in order not to prevent the creation of new aggregated information products and services. Excessive time-lags between the request to re-use documents and the decision on these requests can hamper the establishment of data collections covering the whole of the Community, since the slowest country will set the pace.
- (12) Where charges are made, the total income from allowing access to or re-use of these documents should not exceed the total costs of producing, reproducing and disseminating them, together with a reasonable profit margin. Production includes collection and collation, and dissemination may also include user support. Recovery of costs, together with a reasonable profit margin, constitutes an upper limit to the

charges, as any excessive prices should be precluded. The public sector bodies should have the possibility of applying lower charges or of not charging at all, and Member States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs for reproducing and disseminating the documents.

- (13) Charges and other conditions for the re-use of public sector information should be non-discriminatory. This also applies to the commercial activities of public sector bodies that fall outside their public task. This means that the same input conditions should apply to the commercial activities of public sector bodies as to the activities of other actors in the market. In particular the charges and other conditions associated with the provision of public information as inputs for those commercial activities should be the same as those applied to third parties requesting such information.
- (14) Ensuring that the conditions for re-use of public sector information are clear and publicly available is a pre-condition for the development of a Community-wide information market. Therefore all applicable conditions for the re-use of the information should be made clear to the potential re-users.
- (15) Standard licence agreements that are available online can also play an important role in this respect. In all cases where the public sector bodies exercise their intellectual property rights and/or charge for the re-use of the documents standard licence agreements should be available to facilitate transactions and to increase their transparency.
- (16) Public sector bodies should not run the risk of conflict with the basic competition policy principles and should not adopt conduct that could constitute an abuse of a dominant position. Exclusive arrangements between public sector bodies and private partners for the exploitation of the documents can lead to considerable market distortions. In many cases these arrangements will have a national basis, thereby preventing other Community players from entering the market and re-using the same information. However, for the purposes of providing a service of general economic interest, an exclusive right to re-use specific public sector information resources may sometimes be necessary. This may be the case if no commercial publisher would publish the information without such an exclusive right.
- (17) The re-use of public sector information resources should fully respect the particular obligations of the authorities under 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<sup>5</sup>. In particular, personal data collected by public sector bodies should not be used for purposes that are incompatible with the original, explicit and legitimate purpose(s) for which they were collected. Re-use of personal data or documents containing personal data for commercial purposes may generally not be compatible with such original purposes, especially not in cases where the collection of personal data by the public authority is obligatory and where the data subjects cannot refuse the processing of their personal data.

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<sup>5</sup> OJ L 281, 23.11.1995, p. 31.

- (18) The intellectual property rights of third parties are not affected by this Directive. The Directive does not affect the existence or ownership of intellectual property rights of public sector bodies, nor does it limit the exercise of these rights in any way beyond the boundaries set by this Directive. The obligations of this Directive should apply only in so far as the obligations imposed are compatible with the provisions of international agreements on the protection of intellectual property rights, in particular the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>6</sup>. Public sector bodies should, however, exercise their copyright in a way that facilitates re-use.
- (19) The objectives of the proposed action are to facilitate the creation of Community-wide information products and services based on public sector information, to enhance an effective cross-border use of public sector information by private companies for added-value information products and services, to limit distortions of competition on the Community market and to avoid a situation whereby a different pace in the Member States in dealing with the re-use of public sector information leads to further disparities. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, such objectives 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 by the Community. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose,

HAVE ADOPTED THIS DIRECTIVE:

## **Chapter I**

### **General provisions**

#### *Article 1*

##### *Subject matter and scope*

1. This Directive establishes a minimum set of rules governing the commercial and non-commercial exploitation by any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State of existing documents held by public sector bodies of the Member States which are generally accessible.
2. This Directive shall not apply to:
  - (a) documents the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned as defined by law or by other binding rules in the Member State, or in the absence of such rules as defined in line with common administrative practice in the Member State in question;
  - (b) documents or parts of documents for which third parties hold intellectual property rights;

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<sup>6</sup> OJ L 336, 23.12.1994, p. 214.

- (c) documents containing personal data, unless the re-use of such personal data is admissible under the provisions of Community law and national measures on the processing of personal data and the protection of privacy;
  - (d) documents held by public service broadcasters and their subsidiaries, and by other bodies or their subsidiaries for the fulfilment of a public service broadcasting remit;
  - (e) documents held by educational and research establishments, such as schools, universities, research facilities, archives and libraries;
  - (f) documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres.
3. The provisions of this Directive shall only apply in so far as the obligations imposed are compatible with the provisions of international agreements on the protection of intellectual property rights, in particular the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

*Article 2*  
*Definitions*

For the purpose of this Directive the following definitions shall apply:

- (1) ‘public sector body’ means the state, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several such bodies governed by public law;
- (2) ‘body governed by public law’ means any body:
  - (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - (b) having legal personality; and
  - (c) financed, for the most part by the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law;
- (3) ‘document’ means:
  - (a) any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording);
  - (b) any part of such a content;
- (4) ‘generally accessible document’ means any document to which a right of access is granted under the rules established in the Member State for access to documents as



well as any document used by public sector bodies as an input for information products or services which they commercialise;

- (5) 're-use' means the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes;
- (6) 'personal data' means data as defined in Article 2(a) of Directive 95/46/EC.

*Article 3*  
*General principle*

Where public sector bodies allow the re-use of documents that are generally accessible, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in chapters II and III.

## **Chapter II**

### **Conditions for re-use**

*Article 4*  
*Availability*

1. Public sector bodies shall make their documents available in any pre-existing format or language, through electronic means where possible and appropriate. This does not imply an obligation for public sector bodies to create documents or to adapt documents in order to comply with the request.
2. Public sector bodies cannot be required to continue the production of a certain type of documents with a view to the re-use of these documents by a private sector organisation.

*Article 5*  
*Time and requirements in case of a negative decision*

1. Public sector bodies shall process the requests for re-use and shall make the document available to the applicant within a reasonable time that is not longer than the timeframes foreseen for treating requests to accessing the documents, through electronic means where possible and appropriate.
2. Where no time-limits have been established, public sector bodies shall process the request and shall deliver the documents to the applicant within a timeframe of not more than three weeks after its receipt.
3. In the event of a negative decision, the public sector bodies shall communicate the grounds for refusal to the applicant on the basis of the relevant provisions of the access regime in that Member State, one of the exceptions in Article 1(2) or Article 3. Where a negative decision is based on Article 1(2)(b), the public sector body shall include a reference to the natural or legal person who is the rightholder or alternatively to the licensor from which the public sector body has obtained the

relevant material. The public sector body concerned shall not be held liable in the event of such reference being incorrect.

4. Any negative decision shall contain a reference to the means of redress in case the applicant wishes to appeal the decision.

#### *Article 6* *Charging principles*

Where charges are made, the total income from allowing access to or the re-use of these documents shall not exceed the cost of producing, reproducing and disseminating them, together with a reasonable return on investment. The burden of proving that charges are cost-oriented shall lie with the public sector body charging for the re-use of the document.

#### *Article 7* *Non-discrimination*

1. Any applicable conditions for the commercial re-use or exploitation of documents shall be non-discriminatory.
2. Any applicable conditions for the non-commercial re-use of documents shall be non-discriminatory for comparable categories of re-users.
3. If documents are used by a public sector body as input for its commercial activities which fall outside the scope of its public tasks, the same charges and other conditions shall apply to the supply of the documents for those activities as apply to other users, where re-use is allowed.

#### *Article 8* *Transparency*

1. Any applicable charges for the re-use of documents held by public sector bodies shall be pre-established and published, through electronic means where possible and appropriate.
2. Any other applicable conditions for the re-use of documents shall be clearly expressed and published, through electronic means where possible and appropriate.

#### *Article 9* *Facilitating re-use*

Member States shall ensure that standard licence agreements for the commercial exploitation of public sector information are available in digital format, and can be processed electronically.

## **Chapter III**

### **Fair Trading**

#### *Article 10*

##### *Prohibition of exclusive arrangements*

1. The re-use of documents shall be open to all potential actors in the market, even if one or more market players already exploit added-value products based on these documents. Contracts or other arrangements between the public sector bodies holding the documents and third parties shall not grant exclusive rights that constitute an unjustified restriction of competition or the re-use of the information.
2. If, for reasons such as the provision of a service in the public interest, an exclusive right is deemed necessary, the validity of the reason to grant such an exclusive right shall be subject to regular review, and shall, in any event, be reviewed every three years. The exclusive arrangements established after the entry into force of this Directive shall be open to public inspection.

## **Chapter IV**

### **Final Provisions**

#### *Article 11*

##### *Implementation*

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [31 December 2004] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

#### *Article 12*

##### *Review*

This Directive shall be subject to a review within three years of its entry into force.

The review shall in particular address the scope of this Directive regarding the public sector bodies covered. It shall also address the overall impact of the Directive in increasing the availability of public sector information for re-use and its impact on government revenue.

#### *Article 13*

##### *Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

*Article 14*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the Parliament*  
*The President*

*For the Council*  
*The President*