

INSTITUTIONAL BACKING AND PSI REUSE: IS THE EU GOING TOO FAR OR JUST GOING IN THE WRONG WAY?

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Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 (PSI re-use Directive) has not achieved a minimum harmonisation of national legislations in this area given the lack of strict standard policy. All things considered, it imposes few demands on the side of Member States (MS). Nevertheless, it has been pointed out the convenience of imposing the creation of new institutions —independent authorities— at the national level in order to supply the lack of clear legal provisions, control contraventions of the legal framework regarding access/re-use and provide with rapid and inexpensive mechanisms of resolution of disputes. This option may seem paradoxical in a certain way since it intends an institutional harmonization solution before achieving legal harmonization. Legislation on PSI re-use is somewhat unsatisfactory, so we could consider that the problem we face is not the lack of institutional support, but the inadequacy and vagueness of the legal standard to apply in many cases. This paper suggests that, in favour of legal certainty, transparency and better functioning of the market, the PSI re-use Directive should force MS to specify which types/categories of PSI are reusable and which ones are not, so that legal operators may know what to expect. To address some criticisms of the current situation and solve problems mentioned, the PSI re-use Directive may impose on MS the requirement that a) national regulations concrete the organ/body responsible in each case to resolve requests on PSI re-use and b) establish easier and faster administrative procedures and proceedings before the Courts.

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KEYWORDS

PSI, re-use, independent agencies, EU competence

1. THE REFORM OF DIRECTIVE 2003/98/EC AND THE PROPOSAL FOR CREATION OF INDEPENDENT AGENCIES

Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 (hereinafter, PSI re-use Directive), intends to facilitate the re-use of PSI in the EU framework. For this purpose it has tried to harmonise the basic conditions in which PSI re-use would take place and to remove key obstacles that may exist in the domestic market (such as discriminatory practices, monopolies or lack of transparency among others); always within the limited possibilities that the distribution of powers between EU and MS allows in this particular case.

In the current wording it provided for a future review of the implementation of the PSI re-use Directive in order to proceed to the possible modification of the regulatory text in case the amendment were needed.

However, before making a deeper analysis, two considerations should be pointed out:

1st) The Directive does not adequately promote harmonised regulation for the re-use of PSI: the contents of the PSI re-use Directive could be described as light, very limited or scarce. The Directive hardly achieves a minimum harmonisation of national legislations in this area given the lack of strict standard policy. All things considered, the text imposes few demands on the Member States (MS).

2nd) To a large extent, this happens in the understanding that the presumption of re-use is access to PSI¹ and on this point the competence of the EU is more than limited: access to PSI is a national competence reserved to MS.

Although the re-use of PSI is increasing, its enormous potential seems still unexplored. The implementation of the Directive by MS, to date, has failed to totally eliminate some of the main practical problems (e.g. inadequate regulations, inaccurate content, lack of information on available PSI, difficult accessibility by appropriate means; little or no provision at all for public authorities to allow commercial re-use of information in its posses-

¹ On the relation between access and re-use: Cerrillo i Martínez, A. 2006, 'La información del sector público: del acceso a la reutilización' in *La reutilización de la información del sector público*, coord. A. Cerrillo i Martínez y A. Galán Galán, Comares, Granada, pp. 1-24.

sion; continuity of exclusive agreements with insufficient transparency; excessive complexity of the procedures in order to obtain permission to carry out the re-use; burdensome review systems).

That is why it should be considered amending the Directive in order to introduce stricter provisions that achieve higher levels of efficiency in the re-use of PSI. Nevertheless, instead of doing so, it has been pointed out the convenience of imposing the creation of new institutions at the national level in order to supply the lack of clear legal provisions and therefore impulse/facilitate PSI re-use. This option may seem paradoxical in a certain way, for implicitly intends *institutional harmonization* before achieving *legal harmonization*.

Related to the institutional backing, it has been suggested to set up mandatory and independent authorities mainly in order to control contraventions of the legal framework regarding access and re-use, as well as to provide with rapid and inexpensive mechanisms of resolution of disputes.

2. EU COMPETENCE ON PSI RE-USE: ANALYSING THE ISSUE FROM A DIFFERENT PERSPECTIVE

Distribution of powers between MS and EU is a key aspect of institutional backing.² It should be noted that the categories "exclusive competence", "shared competence" and "support competence" used by TEU and TFEU are merely ineffective generic categorizations that always require a specific legal basis. Anyway, it should be noted that the Treaties opted for a cast wider than that outlined by the EU Court.³

It is in the area of shared or concurrent competences in which EU action is governed by the principles of subsidiarity and proportionality. Therefore, the EU has to justify that a concrete action is needed at the EU level, that is more effective and that it is a supranational problem. We must also bear in mind that US doctrine of implied powers⁴ has been received, *mutatis mutandis*, within the EU:⁵ this may have the necessary competences, including new ones, for achieving the objectives set by the Treaty or that are essential

² In general: Hinojosa Martínez, L. M. 2006. El reparto de competencias entre la Unión Europea y sus Estados miembros, Tirant Lo Blanch, Valencia; Sander, F. 2006, 'Subsidiarity infringements before the European Court of Justice: futile interference with politics or a substantial step towards EU federalism?', *The Columbia Journal of European Law*, vol. 12, nº 2, pp. 517-ss; Von Bogdandy, A. and Bäst, J. 2006, 'The vertical order of competences' in *Principles of European Constitutional Law*, Hart Publishing, Oxford, pp. 335-ss; Mangas Martín, A. y Liñán Noguerras, D. J. 2011, *Instituciones y Derecho de la Unión Europea*, Tecnos, Madrid, 2011, pp. 69-ss.

³ To go further: Prechal, S., De Vries, S. and Van Eijken, H. 2011, 'The principle of attributed powers and the scope of EU law' in *The eclipse of the legality principle in the European Union*, ed. L. Besselink, F. Pennings, S. Prechal, Kluwer Law International, Alphen aan den Rijn, NL, pp. 213-247.

to the exercise of the functions assigned to the organisation. This will overcome rigidities and achieve the objectives of the Treaty to develop their full potential in those cases where no competence was provided expressly or has been inadequately planned.

The exercise of EU competences, not their definition, is chaired by the principles of subsidiarity, proportionality and adequacy of resources/means. Whenever EU acts within its powers if it does by virtue of shared competence, the intervention must be justified: a) at the failure of MS action (it is so in PSI re-use), b) for better efficiency of the common action (to allow PSI re-use will help a better achievement of the EU targets), and c) by the extent or effects of the action at the EU level. When it comes to talk about PSI re-use we see that the national action in this field is insufficient and that impulse from EU institutions is required.

The PSI re-use Directive goes to the principle of subsidiarity to justify its legal basis, but does so from a number of assumptions which may be called “classic”:

- 1) that access is the premise of the re-use and is a basic MS competence;
- 2) that re-use is a one-matter, not fragmented from the perspective of competence;
- 3) that the overall competence of the EU is limited only to the establishment of certain basic conditions for the MS and that are they are the ones who decide to allow re-use of PSI in exercise of their powers.

Therefore, we understand that:

- 1) In general, re-use—closely connected with access—shall be regulated by each MS and shall not be imposed by the EU (1st general rule). EU should limit its actions to regulate some basic and elementary conditions of re-use that shall be applied wherever the MS have freely chosen to allow it. Where the Directive rules basic con-

⁴ “A political power not expressly named in a constitution but that is inferred because it is necessary to the performance of an enumerated power”. Concept developed by Hamilton and borrowed by Justice Marshall in *McCulloch vs. Maryland* 17 US 316 (1819): “The Constitution grants to Congress implied powers for implementing the Constitution’s express powers, in order to create a functional national government” and “State action may not impede valid constitutional exercises of power by the Federal government”. To go further, Crompton, S. E. 2007, *McCulloch v. Maryland: implied powers of the federal government*, Chelsea House, New York, pp. 46-57 (on the Marshall Court).

⁵ Engström, V. 2009, *Understanding powers of international organizations: a study of the doctrines of attributed powers, implied powers and constitutionalism, with a special focus on the Human Rights Committee*, Abo Akademi University Press, Abo, pp. 53-69 and 128-159.

ditions of re-use it will always comply with EU powers (e.g. free competition). MS are competent to decide on PSI re-use.

- 2) In favour of legal certainty, transparency and better functioning of the market, the Directive itself may force MS to state which types/categories of PSI are reusable and which ones are not, so that legal operators may know what to expect. Each public sector body should be forced to specify what information is reusable and which one is not and why; but doing so they are entirely free to decide about access and reuse. Therefore, the PSI re-use Directive should establish for MS an obligation to specify if a concrete type of information is reusable or not, but in this case they must justify the concrete reasons for preventing re-use (2nd general rule). This cannot be considered an invasion of national competences since the final decision belong to the national authorities. MS must specify what PSI is reusable.
- 3) When an internal legislation, in contravention of the provisions of point 2, does not expressly provide whether a particular type of public information is reusable or not, the Directive could establish as a general subsidiary rule (3rd rule) applicable in the absence of MS specific regulation: that in such cases information is reusable provided that such re-use is compatible with Community law and does not involve harm or injury to the intellectual property, data protection or any other right or legitimate/general interest worthy of protection. MS wishing to avoid this consequence ("re-use implicitly permitted") only have to legislate and do it accurately in the sense lined out in point 2. In case of silence of the MS re-use should be considered implicitly permitted.
- 4) Public information generally available should always be considered reusable by the MS (4th general rule). MS cannot rule against this general statement unless it is required by a good/fair cause, proportionate and worthy of protection in accordance with the principles of EU legal system and/or national one. There should always be a certain margin to the appreciation of local peculiarities, but with caution and restraint. All these decisions must be completely motivated by national authorities.

Of course, MS remain competent to decide if re-use will be allowed with commercial or non-commercial purposes or the type of license required, if any.

- 5) Establishment by the Directive of certain categories particularly relevant, strategic and profitable in which re-use should be allowed in any case (5th rule). MS would be only free to choose between allowing re-use without conditions, with a general license or standard licenses. Re-use here would be considered mandatory. Not to allow access and parallel re-use of some particularly significant information could be understood as an obstacle to the market and free movement of goods and services, so that the EU would then have jurisdiction to intervene. However, it could be, perhaps, one of the boldest steps from a competence standpoint.

This solution implies failure to consider re-use as a whole and fragmenting it into as many plots as types of information that can be distinguished. Therefore, re-use would not be considered in itself as a concrete subject related to a general competence: access and re-use of each type or subtype of information would become an instrument, an incidental or tangential subject related to each of the specific competencies of the EU. In fact, some cases have already been made or are being taken that way, imposing openly access and re-use of some public information from EU institutions, in line with sectorial regulations (e.g. spatial information, environmental information).

Therefore, it would be necessary to think about the categories that would be included in this course, that in any case support a progressive or developmental regulation.

3. FORMAL DUTIES NON CONTENT BASED TO BE IMPOSED BY THE DIRECTIVE

3.1 THE PRESENT LEGAL SITUATION

There is no broad consistency among MS legal frameworks in incorporating the text of the Directive, neither in the practices observed. This was somewhat expected, given the content of the PSI re-use Directive and the existing differences between national laws regarding access to PSI.

Sometimes the right to re-use (with a corresponding obligation for public authorities to allow it) is set in an accurate, clear and precise form, specify-

ing possible legal regimes depending on the type of information. In others, by contrast, generic authorization is anticipated to be the own public sector bodies who decide whether or not to allow access to information for re-use purposes and preserve them either for commercial or non-commercial aims (with the possibility of different legal regimes, given the heterogeneity of information).

There also tends to be a constant existence of a list of exceptions to re-use set out by law and therefore not subject to valuation by public bodies.⁶ These listings are not necessarily restrictive/limitative/precise. In those cases not included in them it might be possible, depending on the national legislation, either refuse to allow re-use at all, or allow it only for non-commercial purposes.

3.2 LACK OF PRECISE LEGAL NORMS: THE FIRST REAL PROBLEM

As there are no standards sufficiently clear and explicit (with margins of discretion lower than those found in some domestic systems) to enable public authorities to act and specify in what direction, we find that we cannot advance too much.

Legislation on PSI re-use is somewhat unsatisfactory, so we could consider that the problem we face is not the lack of institutional support, but the inadequacy and vagueness of the standard to apply in many cases. In part, those MS that incorporate internal regulations do it in a not very accurate way because the Directive allows them so. It may be seen a direct consequence of the very low achieving harmonization, but also because the PSI re-use Directive does not even require the Legislators to be accurate in national development, leaving aside its specific content.

This is, *contrario sensu*, the Directive should oblige to regulate the key issues related to the PSI re-use expressly and precisely, but cannot determine the content of such regulation at the national level, paying special attention to mechanisms of control and review.

⁶ Respecting the MS in this particular point, the principle of proportionality must be remembered in the sense required by the Court Decisions, and for all, Decision of the CJEU, Second Chamber, December 21st, 2011.

3.3 FORMAL DUTIES

1°) Explicit regulation: The Directive should oblige MS to act normatively in a clear and accurate way listing what information is reusable and what is not, without fixing "the re-usable" itself, except for few exceptions (5th rule above).

The lack of clarity or certainty of the law regarding the reusable information can be understood as an obstacle to the market, free movement of goods and services and the right fulfillment of other EU aims; so that it would then be competent to intervene, even in a subsidiary and proportionate way.

Perhaps one way to reduce undesirable regulatory gaps and the corresponding uncertainty about the status of certain categories of reusable PSI would be the establishment in the Directive of a general principle according to which, in absence of clear rules which prevent a certain type of PSI re-use, the same will be understood reusable. Nevertheless, this principle must be fully compatible and respectful of the rules on intellectual property, data protection and other limits for the regulation of PSI re-use in the Directive.

In addition, to address some criticisms of the current situation and solve problems mentioned, the Directive could impose on MS the requirement that a) national regulations point to precisely the organ/body responsible in each case to resolve requests on PSI re-use and b) establish easier and faster administrative procedures and proceedings before the Courts.

2°) Publicity: The Directive should require the publicity of certain content by various means, suitable and easily accessible, understandable, in order to provide transparency to the market.

It must include in any case the applicable legislation in general; the categories of PSI reusable and the excluded categories of re-use; re-use conditions in each case; the procedure to be followed, as appropriate, to request / obtain / proceed to the re-use; legal terms; ways of review and appeal; existence of exclusive agreements, their duration and reasons for the grant; charging principles; court decisions, case law and administrative precedents on the subject ... There are no competence impediments, in principle, for such publicity duty.

3°) Regular reporting duty: once again in a double level, national and European. Information should be sent periodically not only on the applicable regulations and any amendments, but specially the one related to all

types of incidents arising (number of requests, response by the authorities, sectors where requests for re-use are more frequent; existence and conditions of exclusive arrangements, and disciplinary infractions; conditions of access and format in which provides the information, update formats...).

4. SPECIAL CONSIDERATION OF REGULATORS/ INDEPENDENT AGENCIES: REINFORCING INSTITUTIONAL BACKING

Re-users, stakeholders and scholars have emerged as a major practical problem in day to day in this field the silence about the body responsible for deciding about re-use as well as the excessive length and complexity of the administrative proceedings and judicial review, all framed in a backdrop of regulatory uncertainty and reluctance by the authorities.

This has led to propose as a solution the creation of independent regulators/independent agencies.⁷ However, we must stress that:

- A) The first step is to provide accurate legal provisions; then, if they do not work, specific institutions of this nature could be created. But at this moment it may be premature to consider the creation of such agencies.
- B) The institutional backing already existing is solid enough from a general perspective bearing in mind the standards of an average democratic State.

4.1 GENERAL PRE-EXISTING INSTITUTIONAL BACKING

MS are legally bound to develop the Directive. The development rules will be forced fulfilment for the national Public Administrations and different organisms of the respective public sector. This compliance will be assured by ordinary and customary mechanisms according to the rule of law.

Given that legal duties are imposed, they shall automatically be met by public authorities. In the case of infringement, citizens/particulars/ institutions can demand the fulfilment of those legal duties before the Public Administration and even before the Courts. We should not forget that in the context of democratic States, all public authorities must act in full subordi-

⁷ On independent administrative authorities (chronologically ordered): Salvador Martínez, M. 2002, *Las autoridades independientes: un análisis comparado de los Estados Unidos, el Reino Unido, Alemania, Francia y España*, Ariel, Barcelona; Caranta, R., Andenas, M. and Fairgrieve, D. (eds.) 2004, *Independent administrative authorities*, British Institute of International and Comparative Law, London; Pauner Chulvi, C. y Tomás Mallén, B. (coords.) 2009, *Las administraciones independientes*, Tirant Lo Blanch, Valencia.

nation to the Constitution and the rest of the Legal System and there are several ways to control any breach.

4.2 DIFFERENT POSSIBILITIES OF SPECIFIC OR ADDED INSTITUTIONAL BACKING

The "institutional" options of MS to adopt on this compliance on PSI re-use vary and go from 1st) creating independent agencies to 2nd) entrusting such performance to the ordinary administrative structure, passing through the 3rd) special creation of ad hoc bodies incardinated in the ordinary Public Administration -and, therefore, without consideration of independent authorities- but with autonomous functioning.

4.3 ARE INDEPENDENT AGENCIES/REGULATORS AN IDEAL SOLUTION?

However, on the desirability/necessity of special institutions or independent authorities with responsibility for PSI re-use similar to those existing in some sectors (data protection, telecommunications competition, to name some prominent examples), there are some questions to be highlighted.

1st) High economical costs and added complexity

There are undeniable cons for the creation of independent agencies, especially at the present time, most notably the high economic costs and an undesirable increase of the already high complexity of Public Administration; an inconvenience accentuated in decentralised States.⁸ In fact, the current trend in a number of MS is the removal or at least the reduction or fusion of these independent authorities.

2nd) Need of a uniform approach in institutional backing

It is hard to answer this question given the present situation. There seems not to be a priority need, at least not for now, to achieve a uniform approach to control institutions in charge of supporting PSI re-use or to impose a model based on the creation of independent agencies. The priority should be to ensure a legal framework not only harmonised but also clear and precise and to guaranty that it is respected.

How MS implement and monitor such a regulatory framework would be an issue required of specific institutional solutions decided by EU only if se-

⁸ Salvador Martínez, M. 2005, 'Autoridades independientes y organización territorial' in El estado autonómico: integración, solidaridad, diversidad, coord. M. A. García Herrera, J. M. Vidal Beltrán, vol. 2, COLEX, Ministerio de Administraciones Públicas-INAP, Madrid, pp. 427-450.

rious breaches of duties throw verifications revealing an inability of regular institutions to adequately control compliance based on structural motifs. However, until that situation is an undoubted reality, imposing a harmonized institutional model can be understood as disproportionate and contrary to the preference shown by the framework Directives. Anyway, we must take into account that imposing a uniform institutional model for MS in the field of PSI re-use may exceed the powers of the EU.

Besides, institutional issues are extremely sensitive because they affect the organisation of the powers and governments of the MS, particularly when they are decentralised. Nevertheless, there are some fields where EU has imposed the establishment of independent agencies nationwide to them; although it could be questionable from a theoretical point of view if this can be done or not from a practical standpoint, it is clear that no serious questions have been raised because there no protests were made in this regard.

If there are theoretical doubts about the possibility of establishing a degree of harmonisation of institutional backing and it does not appear, at least at present, as a primary need because there are other more pressing priorities and alternative media, it may not be appropriate to include specific references in the Directive for now.

3rd) Other possibilities in institutional backing

In case arguments are clearly for the creation of special institutional backing, one alternative might be to create a European Agency⁹ which may be even more effective, reach more unifying practices and become a best guarantor of transparency and fluidity of market (their functions, obviously, would be somehow different). The competence of the EU to create it is less controversial from a competence standpoint.¹⁰

4th) Independent agencies and separation of powers

⁹ On pros and cons of European agencies: Williams, G. D. 2005, 'The EU's independent agencies: institutionalising responsible European governance?', *Political Studies*, n^o 53 (1), pp. 82-99. Comprehensive analysis of the agency phenomenon in the European Union, taking stock of the emergence and development of EU agencies and providing insight into the characteristics as well as the consequences of the on-going EU "agencification" process: Busuioic, M., Groenleer, M. and Trondal, J. 2012, *The agency phenomenon in the European Union: emergence, institutionalisation and everyday decision-making*, Manchester University Press, Manchester.

¹⁰ Decision of EUCJ, May 2nd 2006, case against UK Parliament. It offers a critical point of view: Lavrijssen S. and Ottow, A. 2011, 'The legality of independent regulatory authorities' in *The eclipse of the legality principle in the European Union*, eds. L. Besselink, F. Pennings, S. Prechal, Kluwer Law International, Alphen aan den Rijn, NL, pp. 73-96.

Because of the public body that originates the PSI, there are peculiar circumstances that deserve some comment: PSI from the Judiciary¹¹ and Constitutional Courts. In MS where there is a Supreme Judicial Council or equivalent, with functions that are usually common and with a clear purpose to ensure the independence of the Judiciary, it is hardly conceivable that their submission to any authority other than judges and courts is possible from a legal or constitutional perspective. No administrative authority may monitor or control their actions, including problems related to PSI re-use. Only courts –and usually a supreme one– can control the action of SJC since this is a basic requirement of the principle of separation of powers.

Something similar happens with the PSI from the Legislative:¹² the ultimate sovereign body could hardly be put under an administrative agency unless a clear infringement to constitutional principles is made.

5th) Different types of PSI from a material point of view and the problems they could raise: institutional consequences

From this point of view not all types of PSI show the same profile¹³ and it is conceivable that each of them raises specific problems. While it is quite possible that in some cases data protection is one of the issues to consider in particular, in other cases this issue will hardly be relevant (e.g. meteorological PSI or related to transportation or roads PSI).

Where data protection or intellectual property –just to name the most obvious examples of subject related peculiarities we could find in PSI re-use – are seriously involved, it might be advisable to allow the intervention of independent agencies, but not necessarily newly created ones with competence on PSI re-use. We mean that it could be desirable the intervention of pre-existing independent authorities competent in those subjects, such as data protection, intellectual property or free competition, just to mention a few.

¹¹ In the Spanish case, problems related with legal sources have also risen. On *Acuerdo de 28 de octubre de 2010, del Pleno del Consejo General del Poder Judicial, por el que se aprueba el Reglamento 3/2010, sobre reutilización de sentencias y otras resoluciones judiciales and STS (Pleno Sala de lo Contencioso-Administrativo) de 28 de octubre de 2011*: Avila, A. M. 2011, 'En torno al reglamento de reutilización de sentencias', *Actualidad jurídica Aranzadi*, n° 833, p. 10; Blanquer Criado, D. V. 2012, 'La potestad reglamentaria del Consejo General del Poder Judicial y la regulación del mercado de reutilización de resoluciones judiciales', *Teoría y Derecho. Revista de pensamiento jurídico*, n° 11, junio, pp. 250-273.

¹² Not to mention that in certain cases Parliament designates the members of these independent agencies: Menéndez Alzamora, M. 2003, 'El Parlamento y las autoridades independientes de control', *Corts. Anuario de Derecho Parlamentario*, n° 14, pp. 205-222; García Costa, F. M. 2009, *La función electoral del Parlamento*, Atelier Libros Jurídicos, Barcelona.

¹³ Fernández Salmerón, M. 2006, 'El régimen jurídico de la reutilización comercial de la información del sector público: sujetos destinatarios y tipos de información' in *La reutilización de la información del sector público*, coord. A. Cerrillo i Martínez y A. Galán Galán, Comares, Granada, pp. 25-50.

But this solution, again, implies new different problems. The central issue is that within the re-use, deep singularities from a legal point of view can be raised and taking this as a starting point, we find that:

- a) the existence of an independent agency for PSI re-use¹⁴ *per se* does not guarantee sufficient material specialization to settle all the issues raised quickly and in a satisfying way (not just re-use will be involved, but also competition law, intellectual property, data protection, public health and many other subjects); and
- b) the competence of this PSI re-use independent authority may constantly collide with that of other agencies or authorities.¹⁵ In addition, there could be dangerous contradictions on their criteria, thereby generating legal uncertainty. Solutions would have to be offered by law or by tribunals. In some cases, those of collision between a data protection authority and a PSI re-use agency, the solution seems rather simple: the first one should have some preferential *vis atractiva* because it involves a fundamental right related itself with privacy. But when PSI re-use and free competition collide, the solution to be adopted is not so clear without a legal rule setting up the conflict.

6th) Different alternatives existing in institutional backing, not only independent agencies

When it is suggested as explicit content of the Directive redrafting the obligation to create internally independent agencies, we must insist that it does not seem a priority and an urgent need, as already explained. Even more, the redaction of the Directive should be, at this end, more open or alternative, never imposing a single model for all MS since they remain competent to decide about this kind of organisational decisions.

Therefore, three main alternatives for the PSI re-use Directive regarding this issue must be considered:

- a) akeep silent about this point and not include any mention of the creation of specific institutions, leaving complete freedom to MS to proceed as they deem appropriate, based on local peculiarities;

¹⁴ Mainly descriptive: Díaz, V. y Bringas Valdivia, J. M. 2007, 'Autoridades reguladoras independientes en materia de acceso a la información', *Derecho Comparado de la Información*, UNAM, nº 9, pp. 81-102.

¹⁵ To go further on risks of overlaps between the different authorities as well as on jurisdictional conflicts: Petit, N. 2005, 'The proliferation of national regulatory authorities alongside competition authorities: a source of jurisdictional confusion?' in *Regulation through agencies in the EU: a new paradigm of European governance*, eds. D. Geradin, R. Muñoz, N. Petit, Edward Elgar, Cheltenham, UK, pp. 180-210.

- b) impose the same institutional model for all MS, through the creation of an independent authority (this is the meaning of the proposal we have reproduced at the beginning);
- c) a middle open way, which does not impose a model at all, but mentions and suggests a range of varied possibilities, such as
 - entrusting the matter to the ordinary structure of Public Administration
 - creation of an independent authority
 - involvement of other existing independent authorities, such as data protection agency (there are many more), considering PSI re-use as a whole or fragmenting it from a material point of view
 - mentioning concrete solutions for those most pressing problems (e.g. arbitration or conciliation systems for conflict resolution)
 - creation of organs integrated in Public Administration working with functional autonomy (a solution close to independent agencies, but not exactly the same)

All these alternatives for institutional backing have obvious pros: the advantages in terms of economic costs are clear, in addition to the benefit of sharing resources and experiences. But it is difficult to offer a best solution for all MS, since its appropriateness will vary from one to other.

An additional reflection is to be made on the specific case of allocation of competence for re-use the data protection agencies: nowadays, for many of them re-use as subject of their competence is completely alien. Consequently not only there may be a problem of lack of substantive expertise, but we could also find that when re-use and data protection are opposed in a particular case, almost certainly privacy will be safeguarded without any other consideration. As it has been shown by several recent examples in MS, these agencies trend to prevail privacy against access to public information and, therefore, this solution may even produce some distorting —or even counterproductive— effects from the perspective of transparency and re-use of PSI.

It must be also underlined that many of these independent agencies are so specialized from a material point of view that they sometimes incur in legal deformations, since they tend to see the legal system from a single per-

spective, without considering other rights or interests that could collide with transparency for re-use purposes.

Another possibility to be considered is to attribute various functions related to PSI re-use not to a single authority, but to several of them, depending on the problem or legal issue first positioned in each case (data protection, intellectual property, exclusive agreements that may infringe competition rules, national security, quality of public services, environment...). That means that PSI re-use is not understood as a unit, but torn fragment and considered accessory to other matters. It seems again a decision that should be taken at the national level, not from European institutions.

7th) Functions of the independent agencies

At the origin of the commitment to the creation of independent agencies there is a confidence that the powers attributed to them would irrefutably be better performed, thereby solving the problems noted above (especially that of slow channels or means for resolution of conflicts). Before analyzing this position, it is appropriate to look back at the hypothetical powers they could take.

The answer may differ from one MS to another, but the following are usually suggested as possible, among others: developing good practices guide; inspection and monitoring; possibility of imposing sanctions; development and regulatory functions, setting legal standards; and above all resolutions of demands and conflicts in a quicker and more "independent" way.

In any case, set in the Directive a minimum competence, nothing would prevent the optional expansion of competencies at the national level (expansion of jurisdiction not imposed by the EU, but voluntarily undertaken by the MS). However, it is critical to understand that these agencies, in almost all systems we would dare to say, could never have conferred judicial powers, once again because of the principle of separation of powers.

Attention must be paid as well to two troublesome suggested functions. First, it is the power to impose sanctions. In many legal systems, there are theoretical difficulties to sanction Government or Public Administration. These independent authorities may punish a natural person or private legal person or public officials or employees, demonstrated the fraud, malice or neglect, but not always public bodies. In fact, some national provisions that have developed the Directive have incorporated disciplinary regimes for the re-users, but not for the Government and PSB.

Second, it is the resolution of demands and conflicts procedures, desired to be quick:

1°) It must be remembered that the existence of special mechanisms for resolution of demands and conflicts before these agencies in many MS (if not in all of them) will not prevent subsequent judicial intervention (already themselves overburdened, should be added). Tribunals' jurisdiction is universal and plots of immunity cannot be created.

Nevertheless, it is possible and desirable to introduce conciliation mechanisms and administrative procedures for solving disputes in a faster and cheaper way, but the possibility of further review by the Courts of Justice cannot be excluded in any case.

2°) One also wonders if many of these functions could not be more efficiently exerted by those public bodies involved in each case, through its regular organization. For this purpose, special administrative procedures can be laid down —in terms of re-use— based on the principle of celerity, agility and short periods: nothing prevents Public Administration to be objective in applying the law and set up administrative adequate mechanisms.

3°) Special judicial review proceedings could also be introduced based equally on the principle of celerity. The principle of preference would be questionable, as it is usually reserved for very specific subjects, such as protection of fundamental rights.