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CHAPTER 12

Directive 2013/37/EU – Re-use of Public
Sector Information Directive

Mireille van Eechoud & Corien Prins

[Text of the Directive]

Directive 2003/98/EC of the European Parliament and of the Council
of 17 November 2003 on the re-use of public sector information

Amended by:

**DIRECTIVE 2013/37/EU OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

(Directive on the re-use of public sector information)¹

Text with EEA relevance of 26 June 2013 L 175 1 27.6.2013

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,²

Having regard to the opinion of the European Economic and Social Committee,³

Having regard to the opinion of the Committee of the Regions,⁴ Acting in accordance with the procedure set out in Article 251 of the Treaty,⁵

Whereas:

1. The text of the comments is an update of the 2010 version as prepared by Corien Prins. The original text has been preserved to large extent. Relevant developments up to 1 January 2018 have been taken into account.

2. OJ C 227 E, 24 September 2002, p. 382.

3. OJ C 85, 8 April 2003, p. 25.

4. OJ C 73, 26 March 2003, p. 38.

5. Opinion of the European Parliament of 12 February 2003 (not yet published in the Official Journal), Council Common Position of 26 May 2003 (OJ C 159 E, 8 July 2003, p. 1) and Position of the European Parliament of 25 September 2003 (not yet published in the Official Journal). Council Decision of 27 October 2003.

(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 influences the life of every citizen in the Community, inter alia, by enabling them to gain new ways of accessing and acquiring knowledge.

(3) Digital content plays an important 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, produces, reproduces and disseminates a wide range of information in many areas of activity, such as social, economic, geographical, weather, tourist, business, patent and educational information.

(5) One of the principal aims of the establishment of an internal market is the creation of conditions conducive to 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. Broad cross-border geographical coverage will also be essential in this context. Wider possibilities of re-using public sector information should inter alia allow European companies to exploit its potential and contribute to economic growth and job creation.

(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 document resource. Traditional practice in public sector bodies in exploiting public sector information has developed in very disparate ways. That should be taken into account. Minimum harmonisation of national rules and practices on the re-use of public sector documents 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 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 governing re-use of public sector documents is needed in order to ensure fair, proportionate and non-discriminatory conditions for the re-use of such information. Public sector bodies collect, produce, reproduce and disseminate documents to fulfil their public tasks. Use of such documents for other reasons constitutes a re-use. Member States' policies can go beyond the minimum standards established in this Directive, thus allowing for more extensive re-use.

(9) This Directive does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned. This Directive should apply to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information. To avoid cross-subsidies, re-use should include further use of documents within the organisation itself for activities falling outside the scope of its public tasks. Activities falling outside the public task will typically include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market. The definition of 'document' is not intended to cover computer programmes. The Directive builds on the existing access regimes in the Member States and does not change the national rules for access to documents. It does not apply in cases in which citizens or companies can, under the relevant access regime, only obtain a document if they can prove a particular interest. At Community level, Articles 41 (right to good administration) and 42 of the Charter of Fundamental Rights of the European Union recognise the right of any citizen of the Union and any natural or legal person residing or having its registered office in a Member State to have access to European Parliament, Council and Commission documents. Public sector bodies should be encouraged to make available for re-use any documents held by them. Public sector bodies should promote and encourage re-use of documents, including official texts of a legislative and administrative nature in those cases where the public sector body has the right to authorise their re-use.

(10) The definitions of 'public sector body' and 'body governed by public law' are taken from the public procurement Directives (92/50/EEC,⁶ 93/36/EEC⁷ and 93/37/EEC⁸ and 98/4/EC⁹). Public undertakings are not covered by these definitions.

(11) This Directive lays down a generic definition of the term 'document', in line with developments in the information society. It covers any representation of acts, facts or information – and any compilation of such acts, facts or information – whatever its medium (written on paper, or stored in electronic form or as a sound, visual or audiovisual recording), held by public sector bodies. A document held by a public sector body is a document where the public sector body has the right to authorise re-use.

(12) The time limit for replying to requests for re-use should be reasonable and in line with the equivalent time for requests to access the document under the relevant access regimes. Reasonable time limits throughout the Union will stimulate the creation of new aggregated information products and services at pan-European level. Once a request for re-use has been granted, public sector bodies

6. OJ L 209, 24 July 1992, p. 1. Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29 October 2001, p. 1).

7. OJ L 199, 9 August 1993, p. 1. Directive as last amended by Commission Directive 2001/78/EC.

8. OJ L 199, 9 August 1993, p. 54. Directive as last amended by Commission Directive 2001/78/EC.

9. OJ L 101, 1 April 1998, p. 1.

should make the documents available in a timeframe that allows their full economic potential to be exploited. This is particularly important for dynamic content (e.g. traffic data), the economic value of which depends on the immediate availability of the information and of regular updates. Should a licence be used, the timely availability of documents may be a part of the terms of the licence.

(13) The possibilities for re-use can be improved by limiting the need to digitise paper-based documents or to process digital files to make them mutually compatible. Therefore, public sector bodies should make documents available in any pre-existing format or language, through electronic means where possible and appropriate. Public sector bodies should view requests for extracts from existing documents favourably when to grant such a request would involve only a simple operation. Public sector bodies should not, however, be obliged to provide an extract from a document where this involves disproportionate effort. To facilitate re-use, public sector bodies should make their own documents available in a format which, as far as possible and appropriate, is not dependent on the use of specific software. Where possible and appropriate, public sector bodies should take into account the possibilities for the re-use of documents by and for people with disabilities.

(14) Where charges are made, the total income should not exceed the total costs of collecting, producing, reproducing and disseminating documents, together with a reasonable return on investment, having due regard to the self-financing requirements of the public sector body concerned, where applicable. Production includes creation and collation, and dissemination may also include user support. Recovery of costs, together with a reasonable return on investment, consistent with applicable accounting principles and the relevant cost calculation method of the public sector body concerned, constitutes an upper limit to the charges, as any excessive prices should be precluded. The upper limit for charges set in this Directive is without prejudice to the right of Member States or public sector bodies to apply lower charges or no charges 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.

(15) Ensuring that the conditions for re-use of public sector documents 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 documents should be made clear to the potential re-users. Member States should encourage the creation of indices accessible on line, where appropriate, of available documents so as to promote and facilitate requests for re-use. Applicants for re-use of documents should be informed of available means of redress relating to decisions or practices affecting them. This will be particularly important for SMEs which may not be familiar with interactions with public sector bodies from other Member States and corresponding means of redress.

(16) Making public all generally available documents held by the public sector – concerning not only the political process but also the legal and

administrative process – is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy. This objective is applicable to institutions at every level, be it local, national or international.

(17) In some cases the re-use of documents will take place without a licence being agreed. In other cases a licence will be issued imposing conditions on the re-use by the licensee dealing with issues such as liability, the proper use of documents, guaranteeing non-alteration and the acknowledgement of source. If public sector bodies license documents for re-use, the licence conditions should be fair and transparent. Standard licences that are available online may also play an important role in this respect. Therefore Member States should provide for the availability of standard licences.

(18) If the competent authority decides to no longer make available certain documents for re-use, or to cease updating these documents, it should make these decisions publicly known, at the earliest opportunity, via electronic means whenever possible.

(19) Conditions for re-use should be non-discriminatory for comparable categories of re-use. This should, for example, not prevent the exchange of information between public sector bodies free of charge for the exercise of public tasks, whilst other parties are charged for the re-use of the same documents. Neither should it prevent the adoption of a differentiated charging policy for commercial and non-commercial re-use.

(20) Public sector bodies should respect competition rules when establishing the principles for re-use of documents avoiding as far as possible exclusive agreements between themselves and private partners. However, in order to provide a service of general economic interest, an exclusive right to re-use specific public sector documents may sometimes be necessary. This may be the case if no commercial publisher would publish the information without such an exclusive right.

(21) This Directive should be implemented and applied in full compliance with the principles relating to the protection of personal data in accordance with 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 of the free movement of such data.¹⁰

(22) The intellectual property rights of third parties are not affected by this Directive. For the avoidance of doubt, the term 'intellectual property rights' refers to copyright and related rights only (including sui generis forms of protection). This Directive does not apply to documents covered by industrial property rights, such as patents, registered designs and trademarks. 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

10. OJ L 281, 23 November 1995, p. 31.

by this Directive. The obligations imposed by this Directive should apply only insofar as they 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 (the Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). Public sector bodies should, however, exercise their copyright in a way that facilitates re-use.

(23) Tools that help potential re-users to find documents available for re-use and the conditions for re-use can facilitate considerably the cross-border use of public sector documents. Member States should therefore ensure that practical arrangements are in place that help re-users in their search for documents available for re-use. Assets lists, accessible preferably online, of main documents (documents that are extensively re-used or that have the potential to be extensively re-used), and portal sites that are linked to decentralised assets lists are examples of such practical arrangements.

(24) This Directive is without prejudice to 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 society¹¹ and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.¹² It spells out the conditions within which public sector bodies can exercise their intellectual property rights in the internal information market when allowing re-use of documents.

(25) Since the objectives of the proposed action, namely to facilitate the creation of Community-wide information products and services based on public sector documents, to enhance an effective cross-border use of public sector documents by private companies for added-value information products and services and to limit distortions of competition on the Community market, cannot be sufficiently achieved by the Member States and can therefore, in view of the intrinsic Community scope and impact of the said action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives. This Directive should achieve minimum harmonisation, thereby avoiding further disparities between the Member States in dealing with the re-use of public sector documents. Have adopted this Directive:

11. OJ L 167, 22 June 2001, p. 10.

12. OJ L 77, 27 March 1996, p. 20.

Chapter 1

General Provisions

[Subject matter and scope of the Directive]

Article 1

(1) This Directive establishes a minimum set of rules governing the re-use and the practical means of facilitating reuse of existing documents held by public sector bodies of the Member States.

(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, provided that the scope of the public tasks is transparent and subject to review;
- (b) documents for which third parties hold intellectual property rights.
- (c) documents which are excluded from access by virtue of the access regimes in the Member States, including on the grounds of:
 - the protection of national security (i.e. State security), defence, or public security,
 - statistical confidentiality,
 - commercial confidentiality (e.g. business, professional or company secrets);
- (ca) documents access to which is restricted by virtue of the access regimes in the Member States, including cases whereby citizens or companies have to prove a particular interest to obtain access to documents;
- (cb) parts of documents containing only logos, crests and insignia;
- (cc) documents access to which is excluded or restricted by virtue of the access regimes on the grounds of protection of personal data, and parts of documents accessible by virtue of those regimes which contain personal data the re-use of which has been defined by law as being incompatible with the law concerning the protection of individuals with regard to the processing of personal data;
- (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, including organisations established for the transfer of research results, schools and universities, except university libraries and;
- (f) documents held by cultural establishments other than libraries, museums and archives.

(3) This Directive builds on and is without prejudice to access regimes in the Member States.

(4) This Directive leaves intact and in no way affects the level of protection of individuals with regard to the processing of personal data under the provisions of Union and national law, and in particular does not alter the obligations and rights set out in Directive 95/46/EC.

(5) The obligations imposed by this Directive shall apply only insofar as they are compatible with the provisions of international agreements on the protection of intellectual property rights, in particular the Berne Convention and the TRIPS Agreement.

1. Aim (para. 1). Undoubtedly, the principal reason for implementing a European legal regime on the re-use of public sector information ('PSI') is the high economic value of the large collections of information and data held by public sector bodies in Member States. Geographical, meteorological and transport data, business information, patent, legal data and official statistics are all commodified. The European Commission has funded various studies that sought to quantify the value of PSI for the European Union (EU) economy. The methodologies used were diverse, and in all cases hard reliable data were scarce, and estimates therefore range from EUR 6 (EU25 in 2000) to 134 billion (EU28+ in 2020). Promoting the availability of PSI for commercial use by the private sector is meant to spur growth of European markets for PSI based services and products. The PSI Directive creates a more level playing field for the private sector. Allowing re-use of PSI is also increasingly viewed as a means to improve social engagement, transparency of the political-democratic process and the performance of public sector bodies (evident from recital 16, from recital 4 of Directive 2013/37/EU and the European Parliament's position on the revision proposal adopted at first reading, doc EP-PE_TC1-COD (2011)0430, esp. recitals 3, 4 and 33). Art. 1(1) reveals the Directive's key aim, which is to achieve a minimum level of harmonisation with respect to laws as well as practices of the EU Member States regarding the re-use of PSI. This is done by introducing minimum standards with respect to obligations to allow re-use of information that is public under national law, by requiring transparency of the terms of re-use (including on pricing), limiting exclusive arrangements and stimulating the use of digital standard licences. The ideal is that all documents from public sector bodies that are subject to public access become available for unfettered re-use by any-one, in electronic open format (recital 26 Directive 2013/37/EU). However, Member States retain a large measure of discretion in framing re-use policies.

2. Limitations of scope (para. 2). (a) General Design. The general designing the first European regulatory framework in the area of PSI took a long time. The first step was taken in 1989 with the publication of the so-called Synergy Guidelines. These aimed at strengthening the position of the private sector on the European information market and limiting the role of public sector bodies to the supply of 'raw data', rather than have them competing with the private sector in downstream markets of value added products and services. From the very start, the thorny issue surfaced what the proper demarcation of public tasks is. The Synergy Guidelines had very little effect as they were largely unknown and lacked binding force. The 1998 Green Paper on PSI led to the 2002 proposal for a directive. It took considerable effort to gain consensus on the respective roles, rights and obligations of the public and private sectors with regard to information dissemination and re-use. The legacy of the political struggle and the lobbying of different organisations are apparent when looking at the actual scope of the final directive. **(b) Public tasks.** A crucial issue (and recurring topic of conflict) is the

question what constitutes the 'public tasks' of public sector bodies and what are mere commercial activities. The Directive does not seek to answer that question precisely but provides a procedural definition: a public task is what (national) law, binding instrument or steady administrative practice says it is. That the EU legislator did not substantively define 'public task' is understandable in light of the large freedom Member States historically enjoy with respect to how they organize their public sectors and the fact that the PSI Directive is based on art. 114 TFEU (95 TEC), i.e. the regulatory competence to improve the functioning of the internal market. However, art. 1(2) does require that the scope of the public tasks is transparent and subject to review, even if the public tasks need not be set out in (formal) law. This transparency and review requirement was introduced in the 2013 revision because uncertainty about the scope of public tasks was identified as an important barrier for private companies. These are unlikely to develop products and services if they run the risk of competition from public sector bodies. *See also* art. 10(2). **(c) Documents covered.** Limitations to the scope of the Directive follow from art. 1 but also from art. 2 as the latter's provisions define what a public sector body is and what documents (materials, data) are art. 1 focuses on the nature of documents. A certain resource may be excluded from the scope of the Directive on a number of grounds. First, the re-use regime only applies to documents supplied as part of a public task, so excludes those supplied by the 'commercial' arms of public sector bodies, whether or not in competition with private companies (art. 2(a), recital 9). Of note, the public sector body itself is not allowed to favour its commercial arm over other re-users (*see* art. 10(2)). Second, only documents which are either not subject to intellectual property rights, or where the public sector body controls the intellectual property (copyright, database rights, etc.) are covered (art. 2(b), *see also* discussion below at 5). Third, many of the information resources held by cultural and educational institutions in the public sector remain excluded from the scope of the Directive altogether. Documents held by public sector broadcasters and their subsidiaries are named explicitly (art. 2(d)), as are those of educational and research establishments (art. 2(e)), and of 'cultural establishments', e.g. theatres, orchestras, ballets, film houses. In the 2013 revision of the Directive, documents held by archives, museums and libraries (including university libraries) were made subject to the re-use regime (art. 2(e)-(f)) because the legislator regards their collections 'as a valuable material for re-use in many products such as mobile applications' (recital 18 Directive 2013/37/EU). Member States however are not obliged to allow re-use for those categories (*see* art. 3(2)).

3. Re-use in Relation to Access regimes of Member States (para. 1(2) c-cc, para. 3). Access to public sector documents for reasons of transparency is something different from the re-use of such documents as input for commercial or other activities. This distinction may be difficult to draw in practice, particularly because the PSI Directive defines 're-use' in such a broad manner that it seems to cover activities which arguably are within the scope of right to access laws (e.g. to cite public sector data published under access laws in a news publication). The Directive discussed here deals only with re-use, not access. The right to information held by public authorities is widely regarded as a fundamental principle of democratic states (*see* e.g. art. 42 Charter of

Fundamental Rights of the EU), and the ECtHR increasingly treats it as part of the human right to freedom of expression under art. 10 ECHR (ECtHR *Magyar Helsinki Bizottság*). Some Member States have a long tradition of a broad 'right to information' or 'access to official documents' laws, but many have adopted comprehensive access laws fairly recently. Their primary aim is to ensure accountability of public authorities and stimulate participation in democratic decision-making. Such laws are not harmonized, e.g. with respect to institutions and materials covered. Access laws do however share many principles, like an enforceable right to access for all citizens, a limited catalogue of grounds to refuse access, and duties to pro-actively publish certain information. In many cases, the information obtained will be used for an individual's private purposes or by the media or societal interest groups in public debate. A number of limitations to the scope *ratione materiae* can be explained by the fact that the Directive does not create rights to access information, but builds on existing (national) public access legislation (art. 1(3)). This also explains the focus on 'documents' (rather than data, resources, information), which is also common in access to information laws. Only those documents that are accessible to the entire public come within the scope of the Directive. The Directive does not apply to documents subject to privileged access (art. 1(2)(ca)), i.e. where a right to access is based on special interest (e.g. in some countries this may be the case with respect to certain cadastral or business register documents, court documents, planning permission procedures). For documents that are subject to general access regimes, if legitimate grounds to refuse access exist in national law, the documents will not have to be made public and are thus also exempted from the Directive. Art. 1(2)c lists a number of those interests which commonly feature in national access laws: national security, statistical confidentiality or commercial confidentiality. The exclusion of (parts of documents) containing logos, crests and insignia, e.g. of law enforcement bodies, features in a number of national access laws as well (art. 1(2)(cb)).

4. Privacy and data protection (para. 4). (a) **Primacy of data protection law.** Because so much information held by public sector bodies concerns personal data, in various provisions the Directive makes clear that data protection laws and the right to privacy take precedence over any obligation to allow re-use. In a general manner, art. 2(4) sets this out in a general manner. Art. 1(2)(cc) more specifically targets the interplay between rights to access and re-use with respect to privacy sensitive materials. Where the protection of privacy is a legitimate ground for refusal of (full) access under national access laws, the same (parts of) documents are exempt from the re-use regime (art. 1(2)(cc) first part). What is more, even if in the interest of accountability personal information is made public under access laws (e.g. expenses of public functionaries, recipients of subsidies), the option remains to prohibit parties from re-using said information on the basis of data protection laws. How much leeway Member States have will depend in large part on the interpretation of the General Data Protection Regulation. See also ECtHR (GC) 27.6.2017 (*Satamedia*), which held that a prohibition on the sale of tax information that is public under Finnish access law constituted an interference with the applicant's right to freedom of expression, but was justified under art. 10(2) ECHR. The Court found that the domestic authorities had appropriately

balanced the right to respect for private life and the right to freedom of expression. (b) **Balancing re-use and data protection interests.** The question whether the re-use of PSI containing personal data must be allowed requires a case-by-case assessment to balance adequately the right to privacy, the right to access and re-use. It means that public sector bodies will have to consider whether making certain information available for re-use would be legitimate in the concrete case, according to the criteria set out in EU and national data protection instruments, notably the General Data Protection Regulation (and until 25 May 2018, Directive 95/46/EC). Subsequently, when the disclosure of the information containing personal data is envisaged, public sector bodies will have to observe the rights of data subjects, such as the right to be informed or the right to object to disclosure, especially when the data is intended to be re-used commercially, for instance for direct marketing purposes. The art. 29 Working Party (set up under Directive 95/46/EC) has given various Opinions on the relationship between data protection law, the PSI Directive and freedom of information law, including Opinions 07/2003, 06/2013 and 02/2016. In them WP29 analyses what the full applicability of data protection law (esp. Directive 95/46/EC) implies for re-use policies. It gives some guidance on how to strike a balance between data protection, re-use and transparency, e.g., by suggesting that public sector bodies aggregate data before release, or restrain certain types of (commercial) use through terms and conditions.

5. Intellectual property rights (para. 5). (a) **Public sector copyright and database rights.** One of the most important challenges in our information society is finding the necessary determining factors and the adequate instruments for setting the boundary between free accessibility and exclusive availability of information, more specifically, with respect to the sort of PSI falling within the scope of the Directive discussed here. Public sector bodies often have a de facto monopoly over information resources, which enables them to control use through imposing conditions. Intellectual property rights provide them with additional enforcement mechanisms. Ironically, it was the EU legislature itself that strengthened the position of public sector bodies with the adoption of a sui generis right under the Database Directive 1996. This Directive created a new exclusive right in collections of data in which a substantial investment is made, regardless of whether the production is funded with public or private money. The right can co-exist with copyright for original databases (i.e. collections that testify to creative choices made in the selection and arrangement of the materials). Factual data are protected under the database protection regime and there is no question that various collections of information gathered by public sector bodies (statistical information, environmental data, real estate and land information, addresses for persons and companies, vehicle information, etc.) qualify as protected databases. The Database Directive is under review, adaptations may be proposed in the course of 2018, with a view to the increased importance of data-ownership in today's economy. The PSI Directive does not address intellectual property issues head-on. It does however limit how public sector bodies can exercise their intellectual property rights (recital 22), as an obligation to allow re-use means they are not free to refuse to license, are bound by the charging principles when it comes to setting prices (whether lumpsum or as

royalties), and must grant permissions in a non-discriminatory way. Recital 12 of Directive 2013/37/EU states that the PSI Directive should be without prejudice to the (intellectual property based) rights that employees of public sector bodies may enjoy under national rules (e.g. the moral right to resist mutilation of one's work). **(b) International intellectual property norms.** Because the EU and its Member States are bound by international norms on intellectual property, art. 1(5) stipulates that the obligations imposed by the Directive shall apply only insofar as they are compatible with the provisions of relevant international agreements, in particular the Berne Convention (latest revision 1967) and the TRIPS Agreement. These instruments dictate that foreign authors/right holders must be treated on equal footing with domestic ones, and they also specify minimum standards with respect to the type of subject matter, scope and duration of rights that must be accorded to nationals of contracting states. The instruments do not exclude public authorities, civil servants, etc. from protection. Art. 2(4) of the Berne Convention leaves contracting states free to decide whether official documents (legislative, administrative or legal) and official translations are protected by copyright. There has been no harmonization of government works in the EU to date, and Member States have widely differing regimes. Only laws and court decisions are exempt from copyright in most Member States. The present Directive does not alter this situation. **(c) Industrial property.** Recital 22 stipulates that the term 'intellectual property rights' refers to copyright and related rights only (including sui generis forms of protection). In other words, this Directive does not apply to documents covered by industrial property rights, such as patents, (registered) designs and trademarks.

[Definitions]

Article 2

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 and 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; and
 - (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 content;

(4) 're-use' means the use by persons or legal entities of documents held by public sector bodies, for commercial or noncommercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use;

(5) 'personal data' means data as defined in Article 2(a) of Directive 95/46/EC.

(6) 'machine-readable format' means a file format structured so that software applications can easily identify, recognize and extract specific data, including individual statements of fact, and their internal structure;

(7) 'open format' means a file format that is platform-independent and made available to the public without any restriction that impedes the re-use of documents;

(8) 'formal open standard' means a standard which has been laid down in written form, detailing specifications for the requirements on how to ensure software interoperability;

(9) 'university' means any public sector body that provides post-secondary-school higher education leading to academic degrees.

1. Public sector body (paras 1 and 2). To ensure that across the EU similar public bodies are subject to the Directive, a definition had to be included. It was taken from earlier EU Directives in the area of public procurement (92/50/EEC; 93/36/EEC; 93/37/EEC and 98/4/EC). Note that because access laws in Member States differ with respect to the institutions they apply to, a particular body might be subject to the PSI Directive but not to national access law. The Directive takes a functional approach, whereby the public sector includes all bodies with state authority or public service tasks. Hence, it is stipulated in art. 2(1) that when using the term 'public sector body', this Directive refers to the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law. A body governed by public law must meet three cumulative criteria: (1) the body must be established for the specific purpose of meeting needs that fall in the general interest, and that do not have an industrial or commercial character, (2) it must have legal personality, and (3) either be financed primarily from public funds, or be subject to direct management supervision or have a board which in majority consists of members appointed by public bodies. Public undertakings (art. 102 TFEU) are not public sector bodies within the meaning of the Directive (recital 10). Although public authorities have a dominant influence over public undertakings, the latter have a degree of autonomy, are tasked with selling goods or services (i.e. engage in economic activity) and use similar methods to private firms. They are subject to competition law, but not to the PSI Directive. Of note, in *Compass-Datenbank* the CJEU held that the exercise of intellectual property rights (in this case the sui generis database rights) by a public authority does not in itself constitute an economic activity. The PSI Directive applies to Member States, not to

institutions of the EU. The Commission has its own PSI instrument (Commission decision 2011/833/EU of 12 December 2011 on the reuse of Commission documents) which contains rules similar to that of the PSI Directive.

2. Document (para. 3). The Directive uses many terms to denote the resources it regulates, e.g. 'content', 'information', 'files', 'data'. A pivotal definition is that of 'document' (art. 2(3)), which expresses that any type of information or data is covered as long as it is recorded in analogue or digital form. Compare art. 1(2) Tromsø Access Convention 2009, which defines documents as 'information recorded in any form'. Recital 11 uses the term 'representation of acts, facts or information ... whatever its medium'. Examples are written records of any kind (decisions, letters, reports), sound or audiovisual recordings, datasets, databases, photographs or other types of graphics. Recital 9 makes clear that computer programs are not to be regarded as 'document'. Much information held by public sector bodies is stored in large information systems, which can make it difficult to determine what its component 'document' parts are. For the application of the Directive this should not be a problem, because art. 2(3)(b) provides that 'any part' of content recorded should also be regarded as document. Although not evident from the articles of the Directive themselves, a key limitation appears to be that the documents must be 'held by' a public sector body. Recital 11 explains that this means the public sector body must have 'the right to authorise re-use'. It is not clear what this means. It could point to the intellectual property status of the document, that is, the public sector body must own the rights or the material must be public domain. Or it could be a criterion that reflects that the document actually not just rests with a public sector body, but does so in function of its public tasks (e.g. as opposed to information received by its staff in a private capacity).

3. Scope of re-use (para. 4). Public sector bodies collect, produce, reproduce and disseminate a large variety of information in the exercise of their public tasks. They typically also supply other public bodies with information, and receive information, on the basis of administrative or legal obligations. Art. 2(4) clarifies that the Directive does not apply to situations where public sector bodies exercise their public tasks. It seems to use a very strict and public sector centric definition: any use for purposes other than the initial public task purpose for which the documents were produced constitutes re-use. On a strict reading, this implies that any alternative use by the public sector body itself is subject to the provisions of the PSI Directive, e.g. when information produced originally for one public task is subsequently used for another. It is more likely that use for other public tasks is not re-use. After all, the PSI Directive does not seek to regulate how public sector bodies exercise their public tasks, and art. 2(4) also expressly provides that the exchange of documents between public bodies 'purely in pursuit of their public tasks' does not constitute re-use. See art. 10(2) for a discussion of cases where the public sector body does 're-use'.

4. Personal data (para. 5). As discussed in art. 1(4), the PSI Directive is without prejudice to data protection law, especially Directive 95/46/EC and its successor Regulation 2016/679. To avoid debates about the scope of the term 'personal data', it

is stipulated that this term means data as defined in art. 2(a) of Data Protection Directive. Thus, personal data is to be understood as 'any information relating to an identified or identifiable natural person' (art. 2(a) Data protection Directive; art. 4(1) General Data Protection Regulation). Given the broad definition of personal data under the Data Protection Directive and even more so under the Regulation, many public sector documents will contain personal data. Particularly the possibilities ICTs offer to identify or re-identify persons through combining data from different sources raises the question when public sector bodies should refrain from disclosing data because it relates to identifiable persons.

5. Open and machine readable (paras 6–8). The value of PSI to a large degree depends on the ease with which it can be processed by re-users. The form in which content is available from a public sector body can mean lots of effort must be put into making it re-usable. Having to purchase specialized software in order to access data, converting files, making data content machine-readable, etc. all require investment that can be prohibitive, especially for small and medium sized enterprises, civil society groups and individuals. This is why the 2013 revision of the PSI Directive included explicit norms on usability: public sector bodies are stimulated to supply data in open and machine-readable format (see art. 5), preferably making use of formal standards, that is one approved by a standards-setting organization (like ISO, W3C). Open format means a (1) non-proprietary format, that is a file format which is not controlled by any one party imposing conditions (usually on the basis of intellectual property rights and contract), (2) with specifications that are public. Open formats are free to use by any one and do not require a specific type of software. Open formats should not be confused with open content / open data. The latter means there are no user charges and no intellectual property rights exercised to control the use of the content itself. Machine-readable means the data are structured enough to allow automated processing.

6. Definition of university (para. 9). Because university libraries are subject to the PSI regime since the 2013 revision (whereas universities and other educational and research establishments are not), it was necessary to define what a university is. Only those institutions that offer academic degrees in higher education post-secondary school are covered. They may go by different names: university, college, polytechnic, Grand École, Fachhochschule, etc. As a rule, private universities will be excluded since these either are not bodies governed by public law even though they might be funded for the most part through public funds.

[General principle of Directive]

Article 3

1. Subject to paragraph 2 Member States shall ensure that documents to which this Directive applies in accordance with Article 1 shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV.

2. For documents in which libraries, including university libraries, museums and archives hold intellectual property rights, Member States shall ensure

that, where the re-use of such documents is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV.

1. Obligation to allow re-use. Since the 2013 revision, the Directive obliges Member States to allow re-use of PSI. This obligation must be read in conjunction with the provisions detailing specifically which institutions and which type of documents fall within the Directive's scope. The 2003 Directive contained no obligation to allow re-use (the unchanged recital 9 still testifies to this). As the aim of the Directive is to establish a minimum level of legal security throughout the EU for parties wishing to re-use PSI, it sets out a number of conditions to which Member States must adhere. Non-discrimination, transparency and a means of redress are keywords in this respect and underlie the conditions stipulated in Chapters III and IV of the Directive.

2. Exception for libraries, including university libraries, museums and archives. Not all public sector bodies in the cultural and educational sphere are subject to the PSI Directive (see art. 2(e) and (f) above). For those that are since the 2013 revision, Member States are still not obliged to allow re-use. Of note, even if these institutions are subject to the PSI Directive, its information holdings may be exempt. Libraries and museums host many materials ('documents') in which third parties own intellectual property rights (especially copyright and neighbouring rights). Such materials are excluded from the scope regardless of whether public sector bodies hold them (see art. 1(2)(b)). Art. 3(2) stresses that if Member States allow re-use, this can only apply to documents in which the (university) libraries, archives or museums themselves hold intellectual property rights. An institution can come by intellectual property rights in different ways, e.g. through a transfer of rights (including by public sector employees creating works, or in connection with acquisition of materials) or in its own capacity as database producer (e.g. of catalogues). The text of the provision leaves doubt as to whether it suffices if the museum, archive or library has obtained an exclusive, unlimited licence from the third party, or whether it must have full ownership of intellectual property. Bearing in mind that that so-called moral rights of authors and performers are non-transferable (art. 6*bis* Berne Convention, art. 5 WPPT) and that economic copyright and neighbouring rights of performers (musicians, actors, etc.) are not fully transferable in all EU Member States, this leaves added uncertainty. Also, on a literal reading, public domain materials held by libraries, archives and museums seem not to be covered by art. 3(2). However, considering the objective of the Directive, arguably the provision should be read to include materials in which intellectual property does not or no longer exists. Recital 9 of Directive 2013/37/EU supports this reading. For other special provisions applicable to libraries, archives and museums, see art. 4, art. 6(2) on charging and art. 11(2) on digitisation of cultural resources.

Chapter II

Requests for Re-Use

[Requirements concerning requests for re-use]

Article 4

(1) Public sector bodies shall, through electronic means where possible and appropriate, process requests for re-use and shall make the document available for re-use to the applicant or, if a licence is needed, finalise the licence offer to the applicant within a reasonable time that is consistent with the timeframes laid down for the processing of requests for access to documents.

(2) Where no time limits or other rules regulating the timely provision of documents have been established, public sector bodies shall process the request and shall deliver the documents for re-use to the applicant or, if a licence is needed, finalise the licence offer to the applicant within a timeframe of not more than 20 working days after its receipt. This timeframe may be extended by another 20 working days for extensive or complex requests. In such cases the applicant shall be notified within three weeks after the initial request that more time is needed to process it.

(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 or of the national provisions adopted pursuant to this Directive, in particular points (a) to (cc) of 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, where known, or alternatively to the licensor from which the public sector body has obtained the relevant material. Libraries, including university libraries, museums and archives shall not be required to include such a reference.

(4) Any decision on re-use shall contain a reference to the means of redress in case the applicant wishes to appeal the decision. The means of redress shall include the possibility of review by an impartial review body with the appropriate expertise, such as the national competition authority, the national access to documents authority or a national judicial authority, whose decisions are binding upon the public sector body concerned.

(5) Public sector bodies covered under Article 1(2)(d), (e) and (f) shall not be required to comply with the requirements of this Article.

1. Handling re-use requests within a reasonable time (para. 1). In a dynamic information market, the momentum toward the exploitation of certain information may be of considerable importance for its commercial success. The economic value of traffic data or weather reports e.g. depends on the immediate availability of this information and of their regular updates. In other words, a timely availability of such information is crucial. This again requires that attention should be given to the time limits within which public sector bodies must reply to requests for re-use of this information. In art. 4(1) the Directive stipulates that these time limits should be reasonable and in line with the equivalent time for requests to access the document

under the relevant access regimes of a Member State. Recital 12 expressly mentions that where possible and appropriate use must be made of electronic means to process re-use requests. Once a request for re-use has been granted, public sector bodies should make the documents available in a timeframe that allows their full economic potential to be exploited. Should a licence be needed, the licence granted to the applicant must be finalised within a reasonable time. The timely availability of the requested documents may subsequently be a part of the terms of this licence. See art. 8 for discussion of online licensing schemes used.

2. In the absence of time limits (para. 2). Public sector bodies could of course fail to provide for specific timeframes within which the re-use request is to be handled or the licence offer is to be finalised. In the absence of time limits or other rules regulating the timely provision of documents, the Directive sets the timeframe: not more than twenty working days after the receipt of a request. This timeframe may be extended by another twenty working days for extensive or complex requests. In such cases the applicant shall be notified within three weeks after the initial request that more time is needed to process it.

3. Duty to motivate negative decision on re-use request (para. 3). Various interests could prevent a document from becoming available for re-use. As mentioned above, art. 1 excludes various types of information from the scope of this Directive, which means that grounds for refusal can be found in the national provisions adopted pursuant to art. 1(2)(a), (b) and (c) of the Directive, or in data protection law. Thus, the responsible public sector body could decide that the documents are not to be disclosed and by implication may not be re-used. In some Member States, the law expressly prohibits the commercialisation of personal data. In the event of a negative decision for the above-mentioned or other reasons, art. 4(3) requires that the public sector bodies communicate the grounds for refusal to the applicant. Where a negative decision is based on the argument that third parties hold intellectual property rights over the requested documents (art. 1(2)(b)), the public sector body shall include a reference to the natural or legal person who is the titleholder, where known, or alternatively to the licensor from which the public sector body has obtained the relevant material. To ease the administrative burden on (university) libraries, museums and archives, the obligation to refer the requester to the intellectual property holder does not extend to them. In the context of large scale digitisation projects, it has become clear that for many of their resources it is unclear if and what third party owns copyright or other intellectual property, and where such party may be reached. Identification of right holders is time-consuming and therefore expensive, especially with respect to works in the so-called 20th century black hole: materials that in light of copyright's term of protection of (as a rule) seventy years plus the life of the author are likely to be still protected, but whose right holders are not known. The fact that materials may be subject to multiple intellectual property rights simultaneously (performer's rights, database rights, phonogram and film producer's rights, etc.) complicates matters further.

4. Means of redress (para. 4). Decisions on re-use must be made subject to some kind of appeal. In the event of a negative decision on an access request, this decision must contain a reference to the means of redress in case the applicant wishes to appeal the decision. Recital 15 mentions that adequate information on the available means of redress will be particularly important for SMEs because they may not be familiar with interactions with public sector bodies from other Member States and corresponding means of redress. The 2003 Directive remained silent on what kind of redress should be available. This surfaced as one of the main problems in the 2009 review, as PSI re-users complained that an impartial and speedy complaints mechanism was of the essence and lacking in many Member States. Para. 4 now obliges Member States to ensure decisions on re-use requests can be challenged before an impartial body, whose decision is binding upon the public sector body concerned. Redress should be available not just for negative decisions, but also for decisions permitting re-use but at terms and conditions that the requesting party objects to, e.g. with respect to the charging rules applied (recital 28 Directive 2013/37/EU).

5. Exempted public sector bodies. To ensure that public sector bodies that are exempt from the re-use regime are not drawn into procedures art. 4(5) provides that educational and research establishments, cultural establishments and public service broadcasters are not bound by the provisions on the processing of requests. Note that art. 1(2)(d)-(f) exempts documents held by said institutions, not the institutions per se. Art. 4(5) remained unchanged in the 2013 revision of the Directive. As a consequence, the text has become somewhat ambiguous: it suggests that (university) libraries, archives and museums are also exempt from art. 4, as they are named in art. 1(2)(e)-(f). These institutions are however subject to the PSI Directive since 2013 (see art. 1(2)). The fact that art. 4(3) specifically exempts them from the duty to inform parties about intellectual property right holders in cases where a decision to refuse permission to re-use is due to the documents being subject to third party intellectual property rights, shows that libraries, museums and archives are otherwise subject to art. 4.

Chapter III

Conditions for Re-Use

[Available Formats]

Article 5

1. Public sector bodies shall make their documents available in any pre-existing format or language, and, where possible and appropriate, in open and machine-readable format together with their metadata. Both the format and the metadata should, in so far as possible, comply with formal open standards.
2. Paragraph 1 shall not imply an obligation for public sector bodies to create or adapt documents or provide extracts in order to comply with that paragraph where this would involve disproportionate effort, going beyond a simple operation.

3. On the basis of this Directive, public sector bodies cannot be required to continue the production and storage of a certain type of documents with a view to the re-use of such documents by a private or public sector organisation.

1. Format requirements (paras 1–2). The wording of art. 5 clearly shows that the aim of the Directive is to enhance the smooth functioning and proper development of the Internal Market in the area of information services and products, but not at the expense of public sector bodies. In other words, the regulatory regime must not result in significant new financial and administrative burdens for the public sector. This is why the basic rule of art. 5 is that public sector bodies make documents available 'as is', that is in the format and language in which they hold it (art. 5(1)), and thus also without having to convert or otherwise adapt documents. Nevertheless, the Directive does encourage public sector bodies to supply data in a re-use friendly way whenever possible and appropriate (recital 13). Public sector bodies can facilitate re-use by different parties for all different kinds of purposes by disseminating information digitally, in a structured way (making it suitable for automated processing), using open file formats. The latter means that the re-user is not tied to one specific kind of (proprietary) software to be able to read/process the data. See art. 2(6)–(8). For prospective re-users, the availability of meta-data is of great importance as (good quality) metadata allows them to assess whether the data is of use to them in the first place. Some effort can be expected from public sector bodies, e.g. with respect to converting files to open formats or running simple queries to extract parts of a dataset for re-use. When this amounts to a 'disproportionate' effort is unclear. Finally, public sector bodies are required to consider, again where possible and appropriate, possibilities for the re-use of documents by and for people with disabilities.

2. Termination of availability (para. 3). Once a public sector body no longer needs to collect, produce or process certain information for purposes of exercising its public tasks, it should not be forced to continue doing so merely because the same information is used by others for other purposes. Art. 5(3) expresses this principle: making documents available for re-use does not create an obligation to maintain the documents or continue disseminating them. Recital 18 suggests that a body that decides to discontinue providing certain information or documents for re-use, or to cease updating them, should make this decision public, preferably via electronic means. However, no such obligation is contained in art. 5. It may of course be the case that a public sector body has unilaterally undertaken to supply documents for re-use for a minimum period, or included certain guarantees in re-use licence agreements. Re-users might rely on such guarantees. In certain Member States, principles of good administrative practice might dictate that public sector bodies cannot suddenly stop supplying documents for re-use, but should e.g. give timely notice or put in place transition periods for existing re-users.

[Principles governing charging]

Article 6

1. Where charges are made for the re-use of documents, those charges shall be limited to the marginal costs incurred for their reproduction, provision and dissemination.

2. Paragraph 1 shall not apply to the following:

- (a) public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks;
- (b) by way of exception, documents for which the public sector body concerned is required to generate sufficient revenue to cover a substantial part of the costs relating to their collection, production, reproduction and dissemination. Those requirements shall be defined by law or by other binding rules in the Member State. In the absence of such rules, the requirements shall be defined in accordance with common administrative practice in the Member State;
- (c) libraries, including university libraries, museums and archives.

3. In the cases referred to in points (a) and (b) of paragraph 2, the public sector bodies concerned shall calculate the total charges according to objective, transparent and verifiable criteria to be laid down by the Member States. The total income of those bodies from supplying and allowing re-use of documents over the appropriate accounting period shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment. Charges shall be calculated in line with the accounting principles applicable to the public sector bodies involved.

4. Where charges are made by the public sector bodies referred to in point (c) of paragraph 2, the total income from supplying and allowing re-use of documents over the appropriate accounting period shall not exceed the cost of collection, production, reproduction, dissemination, preservation and rights clearance, together with a reasonable return on investment. Charges shall be calculated in line with the accounting principles applicable to the public sector bodies involved.

1. Marginal cost pricing principle (para. 1). One of the most controversial issues during the drafting of the Directive concerned pricing. Because the Directive covers such a wide variety of public sector bodies of all types and sizes, with different funding mechanisms and positions in information markets, it proved hard to arrive at a default principle. In the end, the 2003 Directive allowed public sector bodies to maintain any pricing regime as long as it was cost-oriented (i.e. market/demand based pricing was not allowed) and any profit margin did not exceed a reasonable return on investment. In the typical case where the production of information by a public sector body in the exercise of its public tasks is funded through public money, from a welfare perspective it makes sense to allow re-use at no cost or the marginal costs of dissemination. The production has after all already been paid for so need not be recouped, at most the costs associated with making the information available for re-use need to be covered. Marginal cost pricing is now the main pricing principle of the Directive (enshrined in

art. 6(1)), where before it was merely the preferred option (recital 14). Various costs may be included: not only the costs of reproduction and dissemination (e.g. postage, handling), but also a proportionate part of the costs associated with e.g. a data portal set up to enable re-use (e.g. cost of development, software and hardware maintenance and connectivity). The EC has produced guidelines on the types of costs that can be regarded as marginal costs of re-use, and on how to calculate charges and costs in case of cost-recovery models (Commission Guidelines PSI 2014).

2. Cost-recovery based pricing principle. (a) Exempted public sector bodies (para. 2). Important exceptions to the marginal cost pricing principle discussed above at 1 exist. Art. 6(2) through (4) deal with these. The exceptions are especially relevant for large information producing bodies that traditionally have supplied not only other public sector bodies with data (cadastral, traffic, weather, mapping, companies) but also the private sector. In a number of Member States such public sector bodies are run under a (partial) self-financing model, meaning they have to charge their users in both public and private sectors in order to recover their costs. Examples are national mapping agencies and business registers. Cultural establishments such as museums might also be tasked with generating revenue, and do so by e.g. charging for commercial reproduction of materials in their collections (art works that are no longer in copyright). It might also be that the public sector body as an institution is not subject to cost-recovery based funding, but only with respect to certain of its information products or services. Art. 6(2)(a) deals with public sector bodies operating under a cost-recovery model. These are exempt from the marginal cost principle. So are libraries, museums and archives, regardless of whether they need to generate (part of) their own income (art. 7(2)(c)). The third category that is exempt is not institution based but document based: if law or common administrative practice dictates that certain information resources ('documents' in the jargon of the Directive) must be produced largely on a cost-recovery basis, re-use charges can also be cost-recovery based (art. 7(2)(b)). **(b) Objective, transparent and verifiable criteria (para. 3).** When a public sector body makes use of its prerogative to charge beyond the marginal cost of reproducing and disseminating documents for re-use, it must base its prices on actual costs, which are calculated using objective, transparent and verifiable criteria. The total costs and fees charged shall not exceed the costs for collection (re) production, preservation, dissemination, and rights clearance plus a reasonable return on investment. For documents held by museums, libraries and archives the reasonable return on investment prices 'may be market-based': recital 23 of Directive 2013/37/EU states that 'prices charged by the private sector for the re-use of identical or similar documents could be considered when calculating a reasonable return on investment'. The burden of proof for the price lies with the relevant public sector body that charges for the supply and re-use. In CJEU *Creditinfo Lánstraust* the EFTA Court opined that the pricing provisions of arts 6 and 7 (of Directive 2003/98/EU) serve to prevent excessive pricing by public sector bodies with information monopolies. The EFTA Court held that prior to setting charges, a substantive examination must be undertaken to show that the total income does not exceed the integral costs of creation, production, reproduction and dissemination (including a reasonable return on investment), or at least an

estimate of the costs and income must be made. Also, any income derived from e.g. fees or taxes payable by third parties towards the collection or production of information must be off-set against the costs. For example, if companies are by law required to file company data with a public register and must pay a fee to be registered, this income must be taken into account when calculating the total costs.

[Transparency]

Article 7

1. In the case of standard charges for the re-use of documents held by public sector bodies, any applicable conditions and the actual amount of those charges, including the calculation basis for such charges, shall be pre-established and published, through electronic means where possible and appropriate.
2. In the case of charges for the re-use other than those referred to in paragraph 1, the public sector body in question shall indicate at the outset which factors are taken into account in the calculation of those charges. Upon request, the public sector body in question shall also indicate the way in which such charges have been calculated in relation to the specific re-use request.
3. The requirements referred to in point (b) of Article 6(2) shall be pre-established. They shall be published by electronic means, where possible and appropriate.
4. Public sector bodies shall ensure that applicants for re-use of documents are informed of available means of redress relating to decisions or practices affecting them.

1. Standard charges (para. 1). As discussed earlier, ensuring transparency with respect to charges and conditions is an important ambition pursued by the Directive. Ensuring that the conditions for re-use of public sector documents are clear and publicly available is a precondition for the development of a Community-wide information market. With respect to standard charges, i.e. charges that can be applied automatically to certain (sets of) documents made available for re-use, these charges must be established and made public beforehand, preferably online. The public-sector body must also be transparent about the basis on which standard charges are calculated.

2. Non-standard charges (para. 2). If individual requests are made for specific types of information, or certain types of re-use that are not covered by standard re-use permissions and charges, a public sector body may have to calculate an individual price. For such non-standard charges, applicants must at least know beforehand on what basis these are calculated. When asked, a public sector body must also provide a specification of how the charges for the specific re-use are calculated.

3. Transparency of cost-recovery obligations (para. 3). To make sure that re-users can know beforehand whether the supply of certain documents is subject to cost-recovery obligations, such obligations must be established in advance, and preferably

be published online. This requirement does not apply to public sector bodies who operate under a cost-recovery model.

4. Means of redress (para. 4). Art. 4 deals with the means of redress generally, focusing especially on decisions whereby permission to re-use is refused. Art. 7(4) lays down an additional information duty for public sector bodies, who must ensure that applicants are informed of available means of redress relating to decisions or practices affecting them.

[Licences]

Article 8

(1) Public sector bodies may allow re-use without conditions or may impose conditions, where appropriate through a licence. These conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.

(2) In Member States where licences are used, Member States shall ensure that standard licences for the re-use of public sector documents, which can be adapted to meet particular licence applications, are available in digital format and can be processed electronically. Member States shall encourage all public sector bodies to use the standard licences.

1. Conditions for re-use (para. 1). In the most liberal of circumstances, public sector bodies pro-actively make available data for re-use, without setting any restrictions on the purposes it can be re-used for. Art. 8(1) allows them to do so and in fact instructs them to limit any conditions imposed to what is really necessary, e.g. to ensure the provenance of the data remains known (attribution clause) or that data is not used in an unlawful manner (e.g. in breach of data protection law). For re-users, licences can provide legal certainty that mere notices may not, e.g. with respect to the type of rights granted (adapt, translate, reproduce, redistribute, sell, etc.) or the temporal and geographical scope of the permission (duration, territory). Particularly with respect to data that is dynamic (i.e. weather data, traffic data and other real-time data) and data that are subject to charges, parties are likely to prefer the certainty of contractual clauses detailing levels of service, update frequencies and the like. The Directive does not prescribe Member States what conditions to impose or avoid.

2. Standard licences (para. 2). The use of licences is not obligatory, but when a licence is used, Member States are required to ensure that standard licences for the re-use of public sector documents are available. Recital 26 of Directive 2013/37/EU states that 'Member States should encourage the use of open licences that should eventually become common practice across the Union'. The Commission Guidelines PSI 2014 contain more specific advice on a number of standard terms common to open licences and encourage Member States to use existing ones. Open licences are (often machine-readable) standard licences that effectively ensure licensees have worldwide and

perpetual permission to copy, adapt and (re)distribute the information at no charge for such uses. Since much information is subject to copyright or database rights, for re-users it is important to have a licence with the necessary permissions rather than having to rely on a public sector body not enforcing its intellectual property rights. Since machine-readable licences can be attached to copies of the information/documents it also makes integration of data from different sources easier to manage. Because the Directive allows the application of different conditions to different types of re-use (*see* art. 10(1)) and for different types of documents, it is likely that Member States use a range of standard licences. This poses the danger of incompatible licensing terms, making it more difficult for re-users to combine content from different sources. Some Member States have chosen to use existing open licences as the default standard licence, like Creative Commons (e.g. The Netherlands, Austria) whereas others have developed their own open government licences (e.g. Licence Ouverte France, Open Government Licence UK).

[Practical arrangements]

Article 9

Member States shall make practical arrangements facilitating the search for documents available for re-use, such as asset lists of main documents with relevant metadata, accessible where possible and appropriate online and in machine-readable format, and portal sites that are linked to the asset lists. Where possible Member States shall facilitate the cross-linguistic search for documents.

1. Practical instruments to facilitate re-use. The Directive applies to a huge variety of public sector bodies in a broad array of domains. For parties interested in re-use it is difficult to know what information is available. This is why Member States are obliged to introduce mechanisms that allow customers to locate information resources and assess their usefulness (through metadata), preferably online. An increasingly important way to improve this is through one-stop portal sites for open data. These sites exist at EU level (<http://data.europa.eu/euodp/en/data/>), national, regional and local levels. The functionalities of such open data sites differ, but generally they at least enable public sector bodies to provide information on which data resources are available for re-use, to supply metadata and information on where the data can be retrieved. Search functions allow users to locate data that is of interest to them. Many data portals also allow public sector bodies to make available their assets directly, either as bulk download or through APIs, Application Programming Interfaces that allow direct and automated access to data for software application. Civil society groups play an important role in spreading knowledge about open data resources. The Open Knowledge Foundation e.g. runs an online list of open data portals from around the world, including some 200 data portals in Europe (<http://dataportals.org/>).

Chapter IV

Non-Discrimination and Fair Trading

[Non-discrimination]

Article 10

(1) Any applicable conditions for the re-use of documents shall be non-discriminatory for comparable categories of re-use.

(2) If documents are re-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.

1. Non-discriminatory re-use conditions (para. 1). If a public sector body decides to impose certain conditions for the re-use of its documents, these conditions may not be discriminatory for comparable categories of re-use. This rule allows for differentiated re-use policies for different types of use or use objectives and for different types of documents. Thus, the provision in art. 10(1) does not prevent a public sector body from charging a fee for commercial exploitation, whilst non-profit organisations may use the same documents free of charge.

2. Commercial activities of public sector bodies (para. 2). (a) **Separation of public tasks and commercial activities.** One of the important effects of the PSI Directive is that it regulates how public sector bodies deal with their commercial arms. As mentioned earlier, public sector bodies collect, produce, reproduce and disseminate documents in order to fulfil their public tasks, but may at the same time use these very same documents for commercial reasons. The latter type of use constitutes a re-use under this Directive (*see* art. 2(4)). As stipulated in art. 10(2), the conditions governing such re-use may not differ from the conditions that apply to other parties if their re-use constitutes a comparable category of re-use. In practice, this means that the responsible public sector body will have to formulate re-use conditions and calculate a re-use fee to apply to documents it already possesses (because it collected these very same documents as part of its public task). This puts the public sector body in the difficult position of being regulator and interested party at the same time. But it is also a precarious situation for private sector companies that operate on the same market as the commercial arm. A thorny issue remains how the public tasks of a particular public sector body can be sufficiently delineated, and how this is done (*see* art. 1(2)(a)). The definition of public tasks in the Directive is a formal one; it remains the prerogative of Member States to decide what type of activities should be part of the public sector's remit. (b) **Services of General Economic Interest.** EU law has a certain impact where the activity by the public authority or its subsidiary amounts to the provision of an economic service (a service of general economic interest) as these are subject to EU internal market and competition rules (including those on State aid). Under EU state aid norms, Member States have however considerable discretion to define what they regard as services of general economic interest (unless these have been regulated

specifically at EU level, like many telecommunications services), precisely because Member States have different histories of public intervention and differences in geographical, social and cultural situations justify diversity. What is more, non-economic services are not subject to EU law. It stands to reason then that diversity with respect to public tasks in the provision of information products and services will remain large across the EU. (c) **No cross-subsidies.** In its 2009 Review (*see* art. 13), the Commission states that demarcating the line between the public tasks and market activities of public sector bodies appears difficult. Examples in the Member States show cases where public tasks are defined in such a way that they cover a very wide range of activities and occupy almost the whole market of added-value PSI services. 'These situations can easily lead to cross-subsidies, where a public sector body uses its "raw" information for further value-added services under more favourable conditions than those offered to competitors. It is very difficult for private re-users to compete with public sector bodies in such circumstances.' The Commission stresses that in order to ensure fair competition and non-discrimination, as prescribed by art. 10(2) of the Directive, public sector bodies must – if they re-use their own documents to produce added-value services in competition with other re-users – charge equal charges and other relevant conditions. The Commission also underlines the importance of a separation of accounts for the public tasks and market activities of public sector bodies.

[Prohibition of exclusive arrangements]

Article 11

(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.

(2) However, where an exclusive right is necessary for the provision of a service in the public interest, the validity of the reason for granting 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 transparent and made public.

This paragraph shall not apply to digitisation of cultural resources.

(2a) Notwithstanding paragraph 1, where an exclusive right relates to digitisation of cultural resources, the period of exclusivity shall in general not exceed 10 years. In case where that period exceeds 10 years, its duration shall be subject to review during the 11th year and, if applicable, every seven years thereafter.

The arrangements granting exclusive rights referred to in the first subparagraph shall be transparent and made public.

In the case of an exclusive right referred to in the first subparagraph, the public sector body concerned shall be provided free of charge with a copy of the digitised cultural resources as part of those arrangements. That copy shall be available for re-use at the end of the period of exclusivity.

(3) Exclusive arrangements existing on 1 July 2005 that do not qualify for the exceptions under paragraph 2 shall be terminated at the end of the contract or in any event not later than 31 December 2008.

(4) Without prejudice to paragraph 3, exclusive arrangements existing on 17 July 2013 that do not qualify for the exceptions under paragraphs 2 and 2a shall be terminated at the end of the contract or in any event not later than 18 July 2043.

1. Open market principle (para. 1). A key principle underlying the Directive is that bringing out the full economic potential of information resources held by the public sector requires that private sector companies have equal access to these resources. In the past, it was not uncommon for public sector bodies to either reserve certain down-stream markets to themselves (by using their dominance or de facto monopoly position derived from their public tasks) or deal with one or a limited number of resellers. Such practices are in principle not allowed under the PSI Directive. Art. 11(1) stipulates that public sector bodies should respect the relevant competition rules when establishing their policies and, subsequently, the conditions for re-use of their information resources. Public sector bodies should avoid entering into exclusive agreements.

2. Exempted exclusive agreements. (a) Exclusive agreement in general interest (para. 2). Exclusive arrangements on re-use may be necessary to ensure a particular service in the public interest is delivered. Such a situation may arise if no commercial publisher would publish the information without an exclusive right (recital 20). All exclusive arrangements entered into after 31.12.2003 (entry into force of the original directive 2003/98/EC) must be transparent and made public. To ensure that the public interest is still served by the exclusive agreement, the grounds that justify it must be reviewed periodically, at least every three years. **(b) Exclusive agreements for digitisation of cultural resources (para. 2a).** The inclusion of libraries and museums in the scope of the PSI Directive came at a time when large digitisation projects were under way in many Member States, e.g. digital library Europeana at the EU level, and Google book projects in various Member States. In order not to jeopardize digitisation efforts, exclusive arrangements are allowed in principle for a period of up to ten years. Longer running agreements must be reviewed every seven years. As is the case with other exclusive agreements, it must be made transparent what the exclusive agreement is and its existence made public. Cultural heritage institutions successfully lobbied for what can only be characterised as an outlier provision: if public sector bodies enter into an exclusive agreement for the digitisation of cultural resources, they have a right to receive a free digital copy. That copy must be made available for re-use at the end of the period of exclusivity. Whether this implies that re-use must be allowed by the public sector body that was party to the agreement, or whether it just means that the (commercial) partner must enable the public sector body to allow third parties to re-use the digitised resources is unclear. Recital 31 of Directive 2013/37/EU suggest art. 11(2a) last sentence suggests the latter: 'any public private partnership for the digitisation of cultural resources should grant the partner cultural institution full rights with respect to the post-termination use of digitised cultural resources'.

3. Grace period for pre-existing exclusive arrangements (paras 3–4). For the first five years of its life, the Directive allowed a transition phase for exclusive arrangements that existed prior to the entry into force of the Directive. Any exclusive arrangements, for which there is no general interest justification (art. 11(2)), should have been terminated by 31 December 2008. During the 2009 review of the Directive the EC commissioned studies that showed exclusive agreements were still in place in many Member States. Some exclusive arrangements are open ended or concluded for very long periods and the exclusive partner (which could be a public undertaking) may have invested heavily in the development of information products and services. To protect them a much longer grace period was introduced for exclusive agreements concluded before 17 July 2013, the date of entry into force of the revised Directive: these are allowed to run for thirty years (art. 11(4)). Since art. 11(4) is without prejudice to the older grace period of art. 11(3), presumably exclusive agreements that have terminated as a result of art. 11(3) may not be revived. There is no time limit for exclusive arrangements with respect to digitisation of cultural resources or for the provision of a service in the public interest.

Chapter V

Final Provisions

[Implementation]

Article 12

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 2005. They shall forthwith inform the Commission thereof. When Member States adopt those measures, 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.

1. General. The implementation date of the original Directive was 1 July 2005, meaning Member States had to make the necessary changes to their national laws and regulations in order to bring into effect the provisions of the Directive. The implementation date of the revised Directive was 18 July 2015 (art. 2 Directive 2013/37/EU). Implementation measures taken must be communicated to the Commission. A list is available at <<https://ec.europa.eu/digital-single-market/en/implementation-public-sector-information-directive-member-states>>. Member States must also report to the Commission on the availability of PSI, conditions of re-use and the redress practice every three years (see art. 13(2)).

2. Implementation. All Member States have implemented the revised Directive, although not many have met the deadline of 18 July 2015. Failure to timely or accurately implement led the Commission to launch infringement cases against eighteen EU Member States. All were resolved and no cases were referred to the Court under arts 258 and 260(3) TFEU. The eighteen transposition infringement cases with

respect to the 2003 directive resulted in CJEU judgements against Austria (ECLI:EU:C:2007:460), Belgium (ECLI:EU:C:2007:794), Luxembourg (ECLI:EU:C:2007:557), Poland (ECLI:EU:C:2011:703), and Spain (ECLI:EU:C:2007:556). Member states have implemented the Directive in different ways: by adopting specific re-use laws, by combining the introduction of new measures and revision of pre-existing legislation, or by adaptation of the existing legislative framework for access to (official) documents (an overview of implementing measures of Member States is available at <http://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32013L0037>). The EC has instituted a 'PSI Expert Group' of Member States representatives to aid best practices in implementation of re-use policy.

[Review]

Article 13

(1) The Commission shall carry out a review of the application of this Directive before 18 July 2018 and shall communicate the results of that review, together with any proposals for amendments to this Directive, to the European Parliament and the Council.

(2) Member States shall submit a report every 3 years to the Commission on the availability of public sector information for re-use and the conditions under which it is made available and the redress practices. On the basis of that report, which shall be made public, Member States shall carry out a review of the implementation of Article 6, in particular as regards charging above marginal cost.

(3) The review referred to in paragraph 1 shall in particular address the scope and impact of this Directive, including the extent of the increase in re-use of public sector documents, the effects of the principles applied to charging and the re-use of official texts of a legislative and administrative nature, the interaction between data protection rules and re-use possibilities, as well as further possibilities of improving the proper functioning of the internal market and the development of the European content industry.

1. Scope of review. As with many other European directives, the Commission has to submit a report on application of the Directive and the need for any adaptation of it. The review of the 2003 Directive was due before 1 July 2008, it was published nearly a year late. It had to include, in addition to general examination of the Directive, specific topics notably on whether re-use had increased as a result of the Directive, and what charging policies public sector bodies used and how this affected re-use. Compare art. 13(3) which lists these topics, but in addition requires that the review of the revised Directive also specifically looks to data protection issues. The review of the revised Directive was due before 18 July 2018, i.e., after the completion of this manuscript.

2. Member State reporting. The original directive did not contain an obligation for Member States to report on how they implemented the PSI Directive. Such three yearly reporting duties were introduced in the 2013 revision to make it easier for the Commission to monitor the effect of the PSI Directive. The Commission itself funded

the development of a 'PSI Scoreboard' (mentioned also in recital 27 of the 2013 Directive) but the project has since folded. The focus of Member States' reporting duties is on issues that have proven difficult to tackle: the switch to no or marginal cost pricing as the default principle, the cutting back on terms and conditions that are unnecessarily burdensome for re-users, and the provision of an efficient and impartial means of redress.

3. The 2009 review. A major problem in designing a European regulatory framework on the re-use of PSI appeared to be the limited understanding of the actual impact of a more open climate of use and re-use of such information. Hard data on the value of PSI for the economy is scarce (see comment on art. 1(1)), as is data on the impact of different charging models for access and exploitation of PSI, and on the administrative burden associated with making PSI available for re-use across all parts of the public sector. In general, reports make frequent use of case studies and positive examples and extrapolate findings from limited quantitative data. It is even more difficult to estimate the welfare benefits of non-commercial uses of PSI, although they may be substantial. On 7 May 2009, the European Commission published its Communication on the Review of the Directive (COM (2009) 212 final). Results of the consultation are no longer easily accessible, but some documents are still available at <https://ec.europa.eu/digital-single-market/en/european-legislation-reuse-public-sector-information>. As regards the potential of the Directive, the Commission concluded that it has introduced the basic conditions to facilitate the re-use of PSI throughout the EU. The review showed that progress had been made since the Directive's adoption. A 2008 study evaluating the impact of the Directive in three main sectors – geographical, meteorological and legal/administrative – the different indicators monitored to measure PSI re-use highlight market growth and an increase in re-use in all of these sectors in recent years (MICUS 12/2008). Commercial re-use of PSI has been allowed, monopolies have been broken, fair trading conditions have been introduced, prices have decreased and there is more transparency. The Commission, however, also notes that progress and implementation of the Directive in the different Member States is uneven and various big barriers still exist. These include: 'attempts by public sector bodies to maximise cost recovery, as opposed to benefits for the wider economy, competition between the public and the private sector, practical issues hindering re-use, such as the lack of information on available PSI, and the mindset of public sector bodies failing to realise the economic potential.' The Commission called upon the Member States to focus their efforts now 'on full and correct implementation and application of the Directive, terminating exclusive arrangements, applying licensing and charging models that facilitate the availability and re-use of PSI, ensuring equal conditions for public bodies re-using their own documents and other re-users, and promoting quick and inexpensive conflict resolution mechanisms'. With respect to future reviews, it should be noted that civil society has in recent years become a driving force behind monitoring open data policies and practices. The Open Knowledge Foundation's Global Open Data Index lists and ranks the open data efforts and availability of public sector data for re-use in over ninety countries worldwide, including EU Member States (see <https://index.okfn.org/>). The availability of PSI online is also an issue monitored in the context

of the Open Government Partnership. This is a global movement of civil society organisations active in the field of transparency and some seventy-five countries (plus the EU) that have committed to drafting and executing Open Government Action Plans. OGP has an Independent Reporting Mechanism (IRM) to annually track progress in participating countries.

[Entry into force]

Article 14

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

1. General. The revised Directive entered into force on 17 July 2013 (art. 3 Directive 2013/37/EU), the twentieth day following that of its publication in Official Journal (OJ L 175, 27 June 2013). The original Directive 2003/98/EC entered into force on 31 December 2003, which was the date of its publication in the Official Journal (OJ L 345, 31 December 2003).

[Addressees]

Article 15

This Directive is addressed to the Member States.