

BRIEFING PAPER

Proposed Amendments to the PSI Directive & Museums, Archives & Libraries

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Introduction

In December 2011, the European Commission announced an *Open Data Package*¹, essentially a set of measures designed to encourage public sector bodies throughout Europe to make their data openly available. The *Package* comprised 3 main elements:

- A communication on the Commission's Open Data Strategy
- A series of proposed amendments to the 2003 *Public Sector Information Directive*
- A series of proposals concerning the availability of the Commission's own information

While the communication on Open Data has been widely welcomed in the cultural heritage community, there has been some concern about the proposal to withdraw a clause which exempted museums, archives and libraries from the Directive (and its implementation in National legislation in Member States).

The Collections Trust has prepared the following briefing paper in response to requests for an assessment of the likely impact of the proposed amendments for UK museums, archives and libraries. We gratefully acknowledge the comments and contributions received from colleagues in the sector.

What is the PSI Directive?

The *Directive on the re-use of public sector information* (Directive 2003/98/EC)² was formally adopted on the 31st December 2003. It is a legally-binding document which sets out conditions for the re-use of public sector information (information that is created and managed by public sector bodies) in European Member States.

What changes are proposed?

The European Commission has put forward a document entitled *Proposal for Directive of the European Parliament and of the Council (Amending Directive 2003/98/EC on re-use of public sector information)*³.

The proposal contains a number of amendments to Articles of the Directive, of which those of primary concern to this paper are:

1. The proposed amendment of *ARTICLE 1 - Subject Matter and Scope* (paragraph 2) to withdraw the current exemption for 'documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres'.

¹ European Commission Press Release – [Commission's Open Data Strategy, Questions & Answers](#)

² Directive on the re-use of Public Sector Information ([EUR-LEX](#))

³ [Proposal for a Directive amending Directive 2003/98/EC](#)

2. The proposed amendment of *ARTICLE 6 – Charges* (various) to restrict public sector bodies to only applying charges for re-use based on marginal cost, noting that there is a specific exemption to this condition which permits ‘libraries (including University libraries), archives and museums’ to apply charges ‘over and above the marginal costs’ for the re-use of their information.
3. The proposed amendment of *ARTICLE 11 – Prohibition of Exclusive Arrangements* to prohibit the agreement of terms for re-use which grant exclusive rights of re-use to any one party.

Why are the Commission proposing the changes?

The Commission invited consultation across Europe on the broad thrust of the proposed changes between the 9th September and 30th November 2010. 598 replies were submitted to this consultation, of which a significant majority were in favour of amendments to the Directive to promote more a more open and proactive approach to the re-use of public sector information.

According to the text of the proposed amendments, *‘The opening up of PSI for re-use will also have a positive effect on the transparency, efficiency and accountability of governments and contribute to citizen empowerment.’*

Ultimately therefore, the PSI Directive aims to catalyse a change of culture in the public sector, creating a favourable environment for value-added activities resulting from the re-use of public information resources.’

In addition to this overall ambition, the proposed amendments are intended to align PSI principles with those in related areas including maritime, transport and environment policy, the promotion of competition, open access to scientific information and the digitisation and cultural heritage.

Who is included in the scope of the Directive?

The Directive applies to ‘public sector bodies’, which include State, local and regional authorities and ‘bodies governed by public law’. The definition of ‘public sector bodies’ is derived from EU procurement legislation.

In the UK, the *Re-use of Public Sector Information Regulations* (2005) provide a specific list of institutions, departments and agencies held to be within the scope of the requirements⁴.

The proposal to withdraw the exemption for museums, libraries and archives, if adopted, would effectively bring the majority of publicly-funded cultural institutions within the scope of the Directive. Since the new Directive would be legally binding on Member States, this would ensure that the exemption was also withdrawn from the UK *Regulations*, making the requirements mandatory on UK museums, archives and libraries falling under the broad definition of ‘public sector body’.

Do the amendments make permitting Re-use mandatory?

If the Directive is amended as proposed, it will not make it mandatory for public sector bodies (including museums, archives and libraries) to permit the re-use of their information.

However, once the institution has re-used the information themselves, or allowed one party to re-use the information, under the terms of the Directive, they must allow all parties to re-use it.

⁴ <http://www.legislation.gov.uk/ukxi/2005/1515/regulation/3/made>

Extent of Re-use in Museums, Archives and Libraries

A research programme⁵ conducted on behalf of the European Commission by the Collections Trust in partnership with ITHAKA (<http://www.ithaka.org>) and Curtis & Cartwright (<http://www.curtiscartwright.co.uk/>) found very limited evidence of the active re-use of public sector information provided by museums, archives and libraries.

According to the study, where cultural institutions are reporting revenues on the commercial licensing of re-use, the returns appear to be marginal. In a significant number of cases, the cultural institutions are not accounting the full economic cost of production, distribution and preservation in the calculated return on licensing activity.

Impact on Charging

In our assessment, if museums, archives and libraries are brought into the scope of the revised Directive, the practical impact on their ability to establish their own charging policies will be limited.

The conditions proposed for insertion into *ARTICLE 6 – Charging* make specific provision for museums, libraries and archives to charge a higher fee than the marginal costs of producing the information. For all practical purposes, this leaves cultural institutions at liberty to establish their own charging policies, as long as they can justify the structure of the fees calculated on the basis of the marginal costs of production plus a reasonable rate of return (our words, not those of the Directive).

Not only this, but a separate proposed clause makes further provision for public sector bodies to apply higher charges for the re-use of their information in ‘exceptional cases, in particular where public sector bodies generate a substantial part of their operating costs relating to the performance of their public service tasks from the exploitation of their intellectual property rights.’

Implications for Exclusivity

ARTICLE 11 – Prohibition of exclusive arrangements in the existing Directive clearly prohibits the creation of agreements, contracts or terms which grant exclusive rights of re-use to any one party. This clause has given concern for cultural institutions that are either already engaged in, or are in the process of negotiating exclusive terms in support of a Public/Private Partnership.

However, the impact of this prohibition on PPP agreements is limited for museums, archives and libraries by two factors:

1. The current Directive already carries a clause which permits the grant of exclusive rights of re-use ‘*where an exclusive right is necessary for the provision of a service in the public interest*’. Hence, if a public sector body can demonstrate that public funds are not available to support the costs of digitisation of their information and that it is necessary to the fulfilment of their public mission to enter into a PPP agreement, then they may do so.
2. The proposed amendment to the Directive makes a further provision specifically for exclusive arrangements involving cultural establishments and university libraries, which ‘shall be terminated at the end of the contract or in any case not later than 31 December 20XX [6 years after entry into force of the Directive].’

The modification of the prohibition on exclusivity, allied to the 6-year ‘grace period’ means that the impact of the extension of the Directive to include museums, archives and libraries on their ability to negotiate time-limited exclusive arrangements with 3rd parties will be minimal.

⁵ [‘PSI Reuse in the Cultural Sector’](#) (2011) Curtis & Cartwright with ITHAKA & the Collections Trust

Reservation of Moral Rights

Article 2(1)(5) of the new directive reserves employees' moral rights. Although not a significant issue, it is important to note that employees retain moral rights which can be infringed by an employer. Employers should exercise caution to avoid such infringement.

Archives in Other Cultural Institutions

The archives of cultural establishments that are not otherwise subject to the directive remain outside its scope (archives of theatres, operas and ballet companies), even though archives generally are brought into scope (recital 10).

Implementation of the 2003 Directive in the UK

The 2003 PSI Directive was implemented in the UK in 2005 through the *Re-use of Public Sector Information Regulations*⁶.

The Regulations inherit from the Directive the specific exemption for museums, archives, libraries and related cultural institutions (see Exclusion 3 below):

These Regulations do not apply to documents held by—

- a) public service broadcasters and their subsidiaries, and other bodies and their subsidiaries for the purposes of the provision of programme services or the conduct of any activities which a public service broadcaster is required or empowered to provide or to engage in by or under any enactment or other public instrument;*
- b) educational and research establishments, such as schools, universities, archives, libraries, and research facilities including organisations established for the transfer of research results; or*
- c) cultural establishments, such as museums, libraries, archives, orchestras, and opera, ballet and theatre establishments*

Adoption of the Proposed Amendments

Under Article 288 of the *Treaty of the Functioning of the European Union*, the adoption of Directives is legally binding on all Member States, but leaves some leeway to national authorities to decide the method of its implementation:

'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

The decision concerning the adoption of the proposed amendments to the Directive is likely to take place during 2012, and if accepted, will result in new UK Regulations in late 2012/early in 2013. It is possible that there may be some scope to influence the precise method of implementation of the Directive in Regulations during the process of adoption.

General considerations

The aim of the proposed amendments to the *Public Sector Information Directive* is to promote the development of a thriving ecology of different types of re-use of Public Sector Information (the value of which the Commission estimates at around EUR32bn per annum).

⁶ <http://www.legislation.gov.uk/uksi/2005/1515/made>

The withdrawal of the exemption for museums, archives and libraries is intended to encourage cultural institutions across Europe to be more proactive in sharing their information (metadata and content) openly for both commercial and non-commercial re-use.

The proposed amendments have, however, been worded carefully to provide a 'mid-way' position for cultural institutions whereby they fall within the ambit of the Directive but are still able to support themselves through the licensing of material for re-use.

The requirements of the amended Directive will have an impact on the operating practice of cultural institutions, and all museums, archives and libraries are advised to familiarise themselves with the content and, where appropriate, to seek legal advice prior to entering into agreements which might compromise these obligations.

In our assessment, however, the threat presented to the current operating practice of museums, archives and libraries by the proposed amendments is minimal, and conversely the Commission's *Open Data Strategy* presents an opportunity to take a positive and proactive stance by demonstrating the value of cultural heritage information to the European economy.

Endnote

The author of this paper is Nick Poole, CEO, Collections Trust. We gratefully acknowledge the following for their advice and comment during the formation of this paper (although this acknowledgement in no way represents an endorsement of this paper or its contents by the parties mentioned):

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Further research and advisory material from the Collections Trust is available from <http://www.collectionslink.org.uk>. Other reports from the Collections Trust include:

- *In from the Cold* – an assessment of the scale and impact of orphan works in cultural heritage collections
- *Digitisation Costs* – a quantitative assessment of the cost of Digitising Europe's cultural heritage
- *Copyright Creative Commons* – factsheet on the application of CC licenses to cultural collections

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