

Unit E4 – Access to Information
DG Information Society and Media
European Commission
L-2557 Gasperich, Luxembourg

Email: INFSO-psihelp@ec.europa.eu

Vienna, November 26, 2010

ISPA CONTRIBUTION FOR THE ONLINE-SURVEY ON THE PSI DIRECTIVE

ISPA (Internet Service Providers Austria) is pleased that the Commission has issued this survey on the PSI Directive. ISPA has identified challenges especially in respect to inequality arising out of the fact that some member states apply the Directive very effectively while others don't. This leads to unequal conditions for entrepreneurs and at the same time to legal uncertainty across the European Union. ISPA sees substantial potential for the improvement of national procedures and would not only welcome the appointment of a national PSI-regulator but also the requirement for one person to be appointed per public sector information holder (PSIH) as a direct contact for entrepreneurs. ISPA welcomes the Commissions initiative to extend the scope of the Directive but is of the opinion that such an expansion of the scope at this moment in time is not desirable as the necessary political discussion would in practise hinder the effective application of the PSI Directive in the member states as it is now. Please find below ISPA's detailed answers to the survey.

1. Context and possible action to consider

Question 1.1: Do you think that PSI re-use has reached its full potential in Europe?

1. ISPA strongly disagrees. (DISAGREE STRONGLY)

Question 1.2: Could further action towards opening up public data resources and practical measures facilitating re-use (asset lists of available documents, simplified or no licensing conditions, marginal costs etc.) contribute to unlocking innovation and developing new services, applications and mash-ups?

1. ISPA strongly agrees. (AGREE STRONGLY)

Question 1.3: Community-wide products and services using PSI are not limited to national borders. Do you think that divergent national rules can make it more complicated to grasp economic opportunities and to develop cross-border products and services??

1. ISPA strongly agrees. (AGREE STRONGLY)

Question 1.4: Should further action be taken at Community level to promote cross-border products and services re-using PSI?

1. ISPA strongly agrees. (AGREE STRONGLY)

Question 1.5: In your opinion, should the PSI Directive be amended?

1. ISPA is of the opinion that the PSI Directive should be amended. (YES)

2. Amendments to the Directive

Question 2.1: If yes, should there be

1. ISPA is of the opinion that “*more substantive amendments to the Directive*” should be made. (YES)
2. ISPA is of the opinion that “*and/or technical adjustments to the Directive clarifying some of the provisions*” should be made. (YES)

Question 2.2: If you think that the PSI Directive should be amended, which issues should in your opinion be addressed? Which provisions should not be amended?

1. Issues to be amended:
 - a. Art 3 of the Directive should contain an explicit obligation for PSIHs to provide PSI on request. The current wording (1st sentence in Article 3 “... where ... is allowed ...”) of Art 3 allows PSIH to simply “opt out”.
 - b. Cost recovery remains a problem because it is not quite clear which costs can be recharged.
 - c. There should be a clear and transparent redress mechanism that works efficiently. Ending up at court is not at all a desirable option.
 - d. The question who is in charge of asset lists etc. has to be addressed effectively. Usually there are no “people” behind the PSIH, as a consequence it is in some cases very difficult to identify the responsible person.
 - e. Reuse of information is often blocked by copyright provisions. In Austria, the High Court of Justice (OGH, 12.06.2007, 4 Ob, 11/07g, *Firmenbuchdatenbank I*) ruled that public registers are protected by “*sui generis*” copyright protection (which is based on the Database Directive) which then is argued to disallow PSI reuse or leads to the levying of copyright charges beyond the provisions laid down in Article 6.
2. Issues not to be amended:
 - a. The scope of the Directive should not be expanded as long as the Directive itself is not been applied properly in the first place.
 - b. The procedures for the request for PSI work well in principle but are not enforceable in case of non-compliance by the PSIH holders.

Question 2.3: Should “soft law” measures be taken possibly in addition to a modification of the Directive, such as Commission guidance or recommendations, regarding the application / interpretation of the PSI Directive?

1. ISPA is of the opinion that such measures should be taken. (YES)

Question 2.4: If yes, which “soft law” measures would you favour?

1. ISPA would favour material which facilitates the interpretation of the Directive. This could be achieved through best practise examples, case law and the exchange of

information on this matter between the European Commission and the Member States.

3. Substance

3.1. Scope (Article 1)

Question 3.1.1: Currently, the PSI Directive is not applicable to information held by cultural, educational and research establishments and public service broadcasters. In your opinion, as far as information is not covered by third party intellectual property rights (excluded in any case from the scope of the PSI Directive), should the Directive apply to information held by?

1. ISPA disagrees that the Directive should apply to information held by “*public service broadcasters*”. (DISAGREE)
2. ISPA disagrees that the Directive should apply to information held by “*educational and research establishments*”. (DISAGREE)
3. ISPA strongly disagrees that the Directive should apply to information held by “*cultural establishments*”. (DISAGREE STRONGLY)

Question 3.1.2: Could you please indicate reasons for or against the inclusion of information held by these establishments? What would be the benefits / difficulties if the scope was extended to cover such information? Are there certain data sets, if not all, held by these establishments that could be valuable for developing new services or applications and that should be made available to re-use?

1. ISPA would in principle welcome these information resources to fall under the scope of the Directive but would like to point out that:
 - a. The Directive is however not working effectively in its current state. The first and foremost aim therefore is to foster the effective application of the Directive as it is now.
 - b. Once the Directive is applied on a high level in all member states, ISPA explicitly welcomes the discussion about including the information suggested above. Any discussion at an earlier point would most likely prove to be counter-productive.

3.2. Definitions (Article 2)

Question 3.2.1: Do you think that the definitions of the PSI Directive cause problems and should be amended or clarified??

1. ISPA is of the opinion that the definitions of the PSI Directive cause problems and should be amended or clarified. (YES)

Question 3.2.1: If yes, could you please indicate which definitions / problems, and how they could be clarified / addressed?

1. ISPA is of the opinion that there is one term in the definitions that has especially lead to confusion and as a consequence needs to be clarified: “*public task*”. The term *public task* is not being homogenously interpreted by the PSIHs. Interpretations by the PSIHs range from “*we should be the better and more innovative enterprises*” to “*earning money is our public task*”. The fact that every PSIH apparently follows its own interpretation leads to legal uncertainty and inequality.

3.3. General principle (Article 3)

Question 3.3.1: Do you think that all public sector information which is already publicly accessible should also be re-usable?

1. ISPA agrees strongly that all public sector information which is already publicly accessible should also be re-useable. (AGREE STRONGLY)

Question 3.3.2: In your opinion, what would be the advantages / disadvantages of this?

1. ISPA is of the opinion that the argument of accessibility is sometimes used as an argument against reuse: The argument that “...because information is accessible there is no need for reuse...” is used as an excuse by the PSIH. Accessible information will in one way or another always be reused: e.g. by search engines, by databases or by site scarping. Such forms of reuse constitute an unregulated and – often unfair – reuse. Therefore all accessible information should also be made available for reuse in the first place.

3.4. Processing of requests (Article 4)

Question 3.4.1: Do you think that the requirements applicable to the processing of re-use requests should be tightened or clarified?

1. ISPA is not of the opinion that the requirements applicable to the processing of re-use requests should be tightened or clarified. (NO)

3.5. Available formats (Article 5)

Question 3.5.1: In your opinion, should more re-use friendly formats (e.g. machine readable) be promoted?

1. ISPA is of the opinion that more re-use friendly formats should be promoted. (YES)

Question 3.5.2: If yes, could you please specify which formats and how?

1. ISPA is of the opinion that information should preferably be made available in xml format. This format would be most suitable for reuse.
2. Often the information that is made available is the result of database queries and not the database format itself. This has an adverse effect on reuse.
3. Another challenge lies in the fact that often files or databases contain “classified” information according to Art. 2 Para 2 and 3 of the Directive. In these cases the whole reuse is usually blocked while the parts of the database (tables) which could still be reused are not made available (“stand alone”) due to arguments based on Article 5 para 1.

3.6. Charging (Article 6)

Question 3.6.1: In your opinion, public sector information should be made available for re-use:

1. ISPA strongly disagrees that PSI should be made available for re-use “*at charges based on full cost recovery, together with a reasonable return on investment*”. (DISAGREE STRONGLY)
2. ISPA strongly disagrees that PSI should be made available for re-use “*at charges based on full cost recovery*”. (DISAGREE STRONGLY)
3. ISPA disagrees that PSI should be made available for re-use “*at charges based on partial cost recovery*”. (DISAGREE)
4. ISPA strongly agrees that PSI should be made available for re-use “*at marginal costs for reproducing and disseminating the documents*”. (AGREE STRONGLY)
5. ISPA agrees that PSI should be made available for re-use “*at marginal costs as the basic rule with certain limited exceptions*”. (AGREE)
6. ISPA has no opinion whether PSI should be made available for re-use “*for free as regards both commercial and non-commercial re-use*”. (NO OPINION)
7. ISPA has no opinion whether PSI should be made available for re-use “*for free as regards non-commercial re-use*”. (NO OPINION)

Question 3.6.2: What would be the benefits of charging based on marginal costs? What could be the disadvantages?

1. ISPA is of the opinion that there would clearly be an economic benefit and lower costs for the reuse of information.
2. The main and underlying argument in this respect is that all the information held by PSIH has previously already been paid for by the taxpayer.
3. The public sector is in some sectors heavily relying on charges and fees for information services. In times of budget restrictions questioning these revenues might lead to long-lasting discussions and will almost certainly encounter fierce criticism.

Question 3.6.3: What could be the exceptions to a default rule of marginal costs?

1. ISPA is of the opinion that exceptions should only be developed by a neutral body (e.g. by a PSI-regulator).

Question 3.6.4: Do you think that the current rules on charging (allowing full cost recovery, together with a reasonable return on investment) should be tightened and/or clarified in respect of how much re-users can be charged?

1. ISPA is of the opinion that the respective rules should be tightened and/or clarified. (YES)

Question 3.6.5: If yes, in what way?

1. ISPA is of the opinion that often information which is available in a database has already been paid for by someone else who was obliged to be entered into this database. (e.g. commercial or land registers often charge a fee for a legally mandatory entry into a public register.) On the basis of full cost recovery usually the revenue already made through the initial “customer” is not taken into account and therefore charged twice.

3.7. Transparency (Article 7)

Question 3.7.1: Do you think that the current transparency rules regarding conditions and standard charges for re-use of PSI should be changed / clarified?

1. ISPA is of the opinion that the current transparency rules should be changed / clarified. (YES)

Question 3.7.2: If yes, could you please indicate how you think this should be done?

1. ISPA is of the opinion that in Austria these rules are not being applied. Thus information on these rules is simply not available.

3.8. Licences (Article 8)

Question 3.8.1: Do current licensing regimes of Member States or of individual public sector bodies still create problems for re-use (e.g. by imposing unfair conditions or by unduly restricting the possibilities for re-use)?

1. ISPA is of the opinion that licensing regimes still create problems. (YES)

Question 3.8.2: If yes, what can be done to address these issues?

1. ISPA is of the opinion that in Austria these rules are generally not applied. Hardly any standard licences exist.

3.9. Practical arrangements (Article 9)

Question 3.9.1: Do you think that more measures should be taken to facilitate the search for documents available for re-use?

1. ISPA is of the opinion that more measures should be taken to facilitate the search for documents available for re-use. (YES)

Question 3.9.2: If yes, which measures?

1. ISPA is of the opinion that PSIHs should be obliged to name a person responsible of PSI issues in every PSIH institution.

3.10. Non-discrimination (Article 10)

Question 3.10.1: In your opinion, have the current rules on non-discrimination caused problems in practice and should they be tightened / clarified to foster fair trading conditions?

1. ISPA is of the opinion that the current rules on non-discrimination have caused problems in practise and should thus be tightened / clarified to foster fair trading conditions. (YES)

Question 3.10.2: If yes, could you please specify how you think this should be done?

1. ISPA is of the opinion that the main issue seems to be PSI relevant arrangements amongst PSIH's themselves which are due to their non-public nature (e.g. between public authorities) highly intransparent and thus could lead to a discrimination of private stakeholders.

4. Practical measures

Question 4.1: Should the Commission encourage deployment measures at national level such as exchange of good practices, awareness raising and/or practical measures facilitating re-use?

1. ISPA is not of the opinion that exclusive arrangements are a problem and that more measures should be taken to address them. (NO)

Question 4.2: If yes, could you please indicate which deployment measures?

1. ISPA is of the opinion that all measures which raise awareness are highly appreciated. The measures mentioned above are a good possibility to achieve this goal.
2. Measure on a European level such as the introduction of PSI regulatory bodies and their coordination on a European level would also be appreciated. A redress mechanism on European level could constitute a solution to overcome national limitations in respect to weak national redress mechanisms.

Question 4.3: Should the Commission promote practical measures such as national portals (like the www.data.gov.uk or the www.data.gov in the US) with a strong political drive towards opening up the wealth of public sector data?

1. ISPA is of the opinion that the Commission should promote practical measures. (YES)

Question 4.4: If yes, could you please specify which measures?

1. ISPA is of the opinion that a major help would be the promotion of the European PSI resources portal and the ePSI-platform. However, national PSI or OGD portals should also be promoted.

5. General issues

Question 5.1: What changes in policy of Member States and/or public sector bodies regarding re-use of public sector information have you noticed since the adoption of the PSI Directive in 2003?

1. ISPA has noticed only little to no changes. Even in the contrary, entities requesting PSI face strong opposition and open ignorance concerning the PSI Directive and the relevant national law (IWG). Progress in Austria has been made only in respect to one certain sector (*Bundesamt für Eich- und Vermessungswesen*).

Question 5.2: What have been the positive effects of the PSI Directive and of these changes? Please give also figures on growth in terms of turnover, staff, number of clients, downloads etc., where possible.

1. ISPA has not noticed any significant positive effects due to the fact that although the Directive has been correctly implemented into national law, it is not being effectively applied. (Please see also question 5.3.)

Question 5.3: What are the remaining barriers to re-use (availability of information, charging, licensing conditions, etc.)?

1. ISPA is of the opinion that the main obstacle is the non compliance of the PSIH with the Directive and national law. ISPA would welcome an obligation for the PSIH to make PSI available (*"to open up"*) especially in cases where PSI is generally accessible.
2. The deliberate mixture of rules for access with reuse provisions in Austria has led to substantial confusion and uncertainty not only among the stakeholder community but also among scholars and judges.

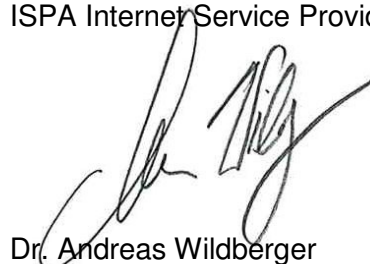
Question 5.4: Would you have any other comments or input that you wish to give regarding the review of the PSI Directive?

1. ISPA welcomes all measures which will support the effective application of the PSI-Directive.

For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Andreas Wildberger
Secretary General

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.