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Subject: Proposal for a Directive of the European Parliament and of the Council amending
Directive 2003/98/EC on re-use of public sector information
-Progress Report

The present report has been drawn up under the responsibility of the Danish Presidency. It sets out the work done so far in the Council's preparatory bodies and it gives an account on the state of play in the examination of the above mentioned proposal.

1. INTRODUCTION

1. On 13 December 2011, the Commission submitted to the Council its proposal for a Directive of the European Parliament and of the Council amending Directive 2003/98/EC on re-use of public sector information.¹ The proposal followed up on the European Council conclusions of 4 February 2011, which called on the Commission to progress on the creation of the digital single market by 2015, including in regard of the availability of public sector information.
2. Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information ('PSI Directive') was adopted on 17 November 2003.² In accordance with Article 13 of the PSI Directive, the Commission carried out a review of the application of the Directive³ and concluded that, despite the progress made, a number of barriers still persisted, which would justify a further Commission review by 2012, when more evidence on the impact of the Directive would be available. The current amending proposal is the result of this second review.
3. The original PSI Directive was adopted on the basis of Article 95 TEC (now Article 114 TFEU) as its subject matter concerned the proper functioning of the internal market and the free circulation of services. The current amending proposal therefore has the same legal basis. Article 114 TFEU provides for the European Parliament and for the Council to act in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee. As the Committee of the Regions was also consulted concerning the original PSI Directive⁴, the Council has also consulted this Committee on the current amending proposal.

¹ Doc. 18555/11.

² OJ L 345, 31.12.2003, p. 90-96.

³ Doc. 9780/09.

⁴ OJ C 73, 26.3.2003, p. 38.

4. The European Parliament has started its first reading on the amending proposal and Mr. Ivailo KALFIN, rapporteur in the industry (ITRE) committee of the Parliament, is expected to present his draft report on 11 July 2012. Parliament's IMCO, CULT and JURI committees are expected to deliver opinions to the ITRE committee. The vote in the ITRE committee is scheduled to take place on 24 September 2012 and the Plenary vote is indicatively scheduled to take place on 10 December 2012.

2. THE COMMISSIONS AMENDING PROPOSAL

1. The three main new elements in the Commission's amending proposal are the extension of the scope of the Directive to also cover cultural institutions⁵, the obligation to allow the re-use of existing accessible documents held by public sector bodies and the charging rules for re-use.
2. On the extension of the scope of the Directive, the amending proposal would oblige some cultural institutions (libraries, museums and archives) to make accessible material available for re-use only insofar as the accessible documents are in the public domain. This obligation would not automatically apply to copyright-protected material of the cultural institutions brought within the scope but only to material that the institution chose to re-use itself. Documents for which third parties hold intellectual property rights would be excluded from the scope of the Directive. Extending the scope would, according to the Commission, therefore merely reflect the reality that cultural institutions increasingly engage in commercial and non-commercial re-use of their material and would subject these institutions to the same rules of fairness, transparency and non-discrimination already expected of other public sector bodies.

⁵ The cultural institutions covered by the Directive are libraries (including university libraries), museums and archives

3. The amending Directive aims to provide a uniform application of the PSI Directive across the EU on which documents held by public sector bodies are permitted to be re-used, by ensuring that, with certain exceptions, all accessible documents will be available for re-use. The proposed changes are intended to provide legal certainty to the public on which documents they can re-use and help prevent data from being unnecessarily withheld from re-use.
4. The Commission's proposal limits charges for re-use to the marginal costs of reproduction and dissemination. However, in exceptional cases, in particular where public sector bodies are obliged to generate a substantial part of their operating costs, such bodies may at maximum recover costs and claim a reasonable return on investment if approved by an independent authority according to objective, transparent and verifiable criteria. Public sector bodies will bear the burden of proof to comply with the charging rules. The proposed rules on default charging at marginal costs do not apply to cultural institutions, which will be able to charge more than the marginal costs, without prior justification but be subject, however, to the existing maximum charge of cost recovery with reasonable return on investment.

3. PRINCIPAL GENERAL REACTIONS OF THE DELEGATIONS

1. The amended proposal has been examined in numerous meetings of the Council's Working Party on Telecommunications and the Information Society ('WP TELE'). In general, delegations welcomed the Commission's proposal and supported its aims although a number of delegations have indicated that the amending Directive is still being considered internally, which is why they have placed scrutiny reservations on the text. Based on the comments from delegations, the examination of the Commission's proposal took place on the basis of Presidency's text, the latest version of which can be found in document 1315/12.

2. Several delegations have expressed reservations on the broadening of the scope of the Directive to some cultural institutions. Some delegations said that cultural institutions would not be able to deal with the administrative burden that inclusion would bring. Many delegations stated that there was still internal discussion about the extension of the scope. Several delegations argued that charging and exclusive agreements are very important factors for the cultural institutions if they are to be brought within the scope of the Directive. Many delegations supported the exception for cultural institutions to make exclusive agreements and some delegations questioned the need for a limit of 7 years. An outcome on this matter may depend on the level of the flexibility of the rules on charging, the possibility of exclusive agreements for cultural institutions and the size of the covered institutions.
3. Many delegations supported the Commission's proposal that marginal costs should be the general rule, although others had concerns that some public sector bodies would not be able to provide information if they could not sufficiently cover their costs. The Commission argued that a limited charging regime is essential to the proposal in order to achieve the large economic potential that this proposal provides.
4. Many delegations believed that the Commission's proposal should be amended to clarify the limits and rules for charging above marginal costs. Many delegations supported the proposal that where charges exceed marginal costs, they should be set according to "objective, transparent and verifiable criteria". In view of the discussions, the Presidency believes that an outcome on this matter may depend on finding the right balance between the general rule on marginal costs and the permitted exceptions for public sector bodies to charge more. In order to provide sufficient clarity for the public, a review of the "objective, transparent and verifiable" criteria by an impartial body may help, although this is still being discussed.

5. Discussions on other areas of the text were fruitful and progress was made on in particular clarifying the documents available for re-use, available formats, redress procedure, licenses, reporting obligations, interoperability and the rules for exclusive agreements. On reporting obligations, some delegations stated that the reporting obligations should not place an undue burden on administrations and should not overlap other reporting requirements.
6. On clarifying the documents available for re-use, certain delegations wanted the public sector bodies to retain the final decision about which documents would be available for re-use. In other cases, some delegations wanted to exclude certain other document types from re-use, as they felt that not all documents that are accessible are necessarily suitable for re-use. A number of textual amendments have been made to the original Commission's proposal in order to try and find a compromise on this issue.
7. In the original proposal from the Commission, there was a reference to an "independent authority" that would be responsible for the redress procedure as well as approving charges above marginal. Several delegations stated that the same body could not be responsible for both decisions. Other delegations wanted clarification on the types of bodies that could fulfil the role. The Presidency text now makes clear that an "impartial body", rather than a (new) "independent authority", shall review negative decisions regarding the re-use of public sector documents.
8. On 25 May 2012, the Coreper agreed to submit this progress report to the Council in view of its meeting on 8 June 2012, where an orientation debate on the file is foreseen and which shall also be based on a number of suggested questions for debate, as set out in document 9963/12.