



## Comments of the EDPS in response to the public consultation on the planned guidelines on recommended standard licences, datasets and charging for the reuse of public sector information initiated by the European Commission<sup>1</sup>

### I. Introduction: balancing open data and data protection

During the past two years, the EDPS was involved in two formal, written contributions to the debate surrounding the re-use of public sector information. First, he issued a formal Opinion in his advisory capacity to the European Commission, Council and Parliament during the legislative process leading up to the adoption of the revised PSI Directive.<sup>2</sup> Second, as member of the Article 29 Data Protection Working Party, he contributed, together with his co-rapporteurs, the Information Commissioners of the United Kingdom and Slovenia, to the Opinion of the Working Party, which aimed at providing guidance to Member States on the implementation of this Directive.<sup>3</sup>

In all his contributions, the EDPS has been advocating for a balanced approach to be followed in all cases of PSI reuse where the protection of privacy and personal data is at stake. On the one hand, rules for the protection of personal data should not constitute an undue barrier to the development of the re-use market. On the other hand, the right to the protection of personal data and the right to privacy must be respected.

In the present comments, the EDPS first briefly summarises the main general findings and recommendations outlined in the two opinions. Second, based on and summarising the findings of these two opinions, he makes targeted recommendations with regard to licensing,

<sup>1</sup> Background: On 12 December 2011, the Commission adopted a proposal (PSI Proposal) for a Directive amending Directive 2003/98/EC on re-use of public sector information (the PSI Directive). The proposal is part of the 'Open-Data Package'. The PSI Directive aims at facilitating the re-use of public sector information throughout the European Union by harmonising the basic conditions for re-use and removing barriers to re-use in the internal market. On 26 June 2013, the European Parliament and the Council adopted Directive 2013/37/EU, amending the PSI Directive. The revised PSI Directive, subject to specific exceptions, now makes it mandatory for public sector bodies to allow re-use of all information they hold, for both commercial and non-commercial purposes, provided the information has already been made publicly accessible under national law and re-use under the PSI Directive is in compliance with applicable data protection law.

The revised PSI Directive calls on the European Commission to assist the Member States in implementing the Directive in a consistent way by issuing guidelines on recommended standard licenses, datasets to be released/improved as a matter of priority and charging for the reuse of documents. The objective of the present public consultation is to seek the views of stakeholders on specific issues to be addressed in the three sets of guidelines. The call for consultation was published at <http://ec.europa.eu/digital-agenda/en/news/consultation-guidelines-recommended-standard-licences-datasets-and-charging-re-use-public>.

<sup>2</sup> EDPS Opinion of 18 April 2012 on the 'Open-Data Package' of the European Commission including a Proposal for a Directive amending Directive 2003/98/EC on re-use of public sector information (PSI), a Communication on Open Data and Commission Decision 2011/833/EU on the re-use of Commission documents. Available at: [https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-18\\_Open\\_data\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-18_Open_data_EN.pdf).

<sup>3</sup> Opinion of the Article 29 Data Protection Working Party of 6/2013 on open data and public sector information (PSI) reuse adopted on 5 June 2001 (WP207). Available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp207\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp207_en.pdf). Unless otherwise stated, all text in quotation marks in these comments is taken from this Working Party Opinion.

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which is one of the three main subject areas where the Commission asked for input from stakeholders.

## II. EDPS Opinion on the Commission's Open Data Package

Following the adoption of the Commission Proposal and with a view towards the on-going legislative process, on 18 April 2012, the EDPS adopted his opinion on the Commission's Open Data Package.

In this Opinion, the EDPS highlighted the need for specific safeguards for data protection whenever PSI contains personal data. He recommended that public sector bodies take a 'proactive approach' when making personal data available for re-use. This would make it possible to make data publicly available, on a case by case basis, subject to conditions and safeguards in compliance with data protection rules.

The EDPS emphasised that the re-use of PSI containing personal data may bring significant benefits, but also entails great risks to the protection of personal data, due to the wide variety of data held by public sector bodies. The Commission proposal should therefore more clearly define in what situations and subject to what safeguards information containing personal data may be required to be made available for re-use.

In his opinion, the EDPS recommended, among others, that the proposal should:

- require that a data protection ***assessment*** be carried out by the public sector body concerned before any PSI containing personal data may be made available;
- require that the terms of the licence to re-use PSI include a ***data protection clause***, whenever personal data are processed;
- where necessary considering the risks to the protection of personal data, require applicants to ***demonstrate*** that any risks to the protection of personal data are adequately addressed and that the applicant will process data in compliance with applicable data protection law, and
- where appropriate, require that data be fully or partially ***anonymised*** and ***license conditions*** specifically ***prohibit re-identification*** of individuals and re-use of personal data for purposes that may individually affect the data subjects.

In addition, the EDPS suggested that the Commission develop further guidance, focusing on anonymisation and licensing, and consult the Article 29 Data Protection Working Party, an advisory body consisting of data protection authorities in EU Member States.

## III. Article 29 Data Protection Working Party Opinion on the revised PSI Directive

At its plenary session on 5 June 2013<sup>4</sup>, the Article 29 Data Protection Working Party adopted its Opinion on the PSI Directive, which provided guidance to Member States on the implementation of this Directive.

The Opinion acknowledged that the re-use of public sector information may bring benefits to society, including greater transparency of the public sector and stimulating innovation. However, it also emphasised that enhanced accessibility of personal data, or anonymised data derived from personal data, is not without risks.

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<sup>4</sup> The Opinion was adopted once the final text of the revised PSI Directive had been approved by the legislators, but ahead of the publication of the Directive in the Official Journal.

For this reason, the Working Party emphasised that when public sector information contains personal data, the re-use of this information is not always allowed according to the applicable data protection laws. Often it will be more appropriate to make available **aggregated** and **anonymised** datasets derived from personal data rather than personal data. The Opinion provides some general guidance on **anonymisation** and anticipates further guidance on more technical aspects of anonymisation, which is expected later this year.

Further, in cases where re-use of personal data as such is allowed, additional legal, technical or organisational measures to protect the data may be necessary. For these cases the Article 29 Working Party stressed that it is important to have a firm legal basis for making personal data publicly available, taking into account the relevant data protection rules, including the principles of proportionality, purpose limitation and data minimisation. To ensure that adequate safeguards are in place, it is recommended to carry out a **data protection assessment** before public sector information containing personal data is made available for re-use. Finally, the Article 29 Working Party also recommended that the terms of **the license to re-use** public sector information **include a data protection clause**, whenever personal data, or anonymised datasets derived from personal data, are made available and provided guidance on the content of such clauses.

#### IV. Article 29 Working Party and EDPS Recommendations with regard to licensing

As stated by the Article 29 Working Party<sup>5</sup>, 'when applying the PSI Directive and data protection law to the reuse of personal data, a public sector body is likely to make one of three different types of decisions:

1. Decision not to make personal information available for re-use under the terms of the PSI Directive
2. Decision to convert personal information into anonymised form (usually into aggregated statistical data)<sup>6</sup> and make only such anonymised data available for re-use
3. Decision to make personal information available for re-use (where necessary, subject to specific conditions and adequate safeguards).'

Licensing may play an important role and serve as a significant safeguard to ensure the protection of personal data in both of the cases listed above, when personal data are made available under the terms of the PSI Directive.<sup>7</sup>

The Article 29 Working Party also emphasised that 'licences do not remove the need for compliance with data protection law but a data protection clause in license conditions would help to ensure compliance with data protection law by adding a layer of 'enforceability'. Such a clause could also help raise awareness by reminding re-users of their obligations as data controllers.<sup>8</sup>

Depending, in general, on whether the information is converted into anonymised form, or rather, made available for reuse as personal data, different types of licensing conditions may be appropriate. The following two Sections will discuss the two situations.

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<sup>5</sup> See Section 1.2 of the Working Party Opinion.

<sup>6</sup> On the reuse of aggregated and anonymised datasets derived from personal data, see Section VI of the Working Party Opinion.

<sup>7</sup> The recommendations below take into account Article 8(1) of the revised PSI Directive, which requires that license 'conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition'.

<sup>8</sup> See Section 10.2 of the Working Party Opinion.

## **V. License terms for anonymised data-sets**

With regard to anonymised data, the Article 29 Working Party recommended in its Opinion<sup>9</sup> that 'the license conditions should

- reiterate that the datasets have been anonymised;
- prohibit license-holders from re-identifying any individuals<sup>10</sup>;
- prohibit license-holders from using the data to take any measure or decision with regard to the individuals concerned; and
- should also contain an obligation on the license-holder to notify the licensor in case it is detected that individuals can be or have been re-identified.'

The Article 29 Working Party also noted that the data protection clause in a license should also give the licensor the right to suspend or terminate accessibility of data (for example, the right to turn off the API or remove the file from the platform) for the case if re-identification has taken place or if there is a risk that such re-identification can take place.

To address the issue of these compromised datasets, the EDPS recommends that at a minimum the following (or similar) text be included in the license terms:

- Licensor shall have the right to suspend or terminate accessibility of data [for example, the right to turn off the API or remove the file from the platform] if it has a reasonable suspicion that part or all of the data subjects whose data were contained in the datasets and whose data were intended to remain anonymous have become re-identifiable ('compromised datasets').
- When notified by the licensor, or when it otherwise becomes aware that a dataset has been compromised, the re-user shall make all reasonable efforts to ensure that it deletes all or all affected parts of any compromised datasets. (In case of a disagreement whether a dataset has been compromised, and pending the outcome of verification, the re-user shall block accessibility to the compromised datasets.)

## **VI. License terms for personal data**

The point of departure for license terms for personal data can be found in the Opinion of the Article 29 Working Party<sup>11</sup>. This states that: 'when personal data are licensed, there is a need to define the limits of the use of such data. Here the key concern is to ensure that any reuse will be limited to what is 'compatible with the purposes for which the data has been initially collected'.<sup>12</sup>

To achieve this, the license conditions must at least make it clear for what purposes data was first published and give indication of what would and what would not be considered as compatible use of personal data.

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<sup>9</sup> See Section 10.3 of the Working Party Opinion.

<sup>10</sup> Limited exceptions might apply, for example, in bona fide cases of re-identification testing. Even in such cases, however, the results of the tests should be brought to the attention of the controller and the public sector body concerned, and the re-identified data should not be published or otherwise disseminated more broadly.

<sup>11</sup> See Section 10.4 of the Working Party Opinion.

<sup>12</sup> See Opinion of the Article 29 Data Protection Working Party of 3/2013 on purpose limitation, adopted on 2 April 2013 (WP 203).

In light of these considerations, the EDPS recommends that - where bespoke and more specific license terms are not feasible or desirable - at a minimum the following (or similar) text is included in the license terms with regard to purpose limitation:

- The licensed dataset contains personal data. The reuse of personal data is subject to [insert reference to applicable data protection legislation].
- The personal data contained in the licensed dataset have been published [if applicable, insert reference to the specific legislation governing the release of the personal data and/or applicable transparency legislation] for purposes of [if applicable, insert the words 'transparency and accountability' and/or a more specific description of purpose where appropriate]. The personal data contained in the licensed dataset can only be reused for these purposes or other purposes compatible with these purposes.

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