Consultation on the UK implementation of Directive 2013/37/EU amending Directive 2003/98/EC on the re-use of public sector information

Submission by Owen Boswarva, 7 October 2014

Thank you for the opportunity to comment on these proposals for UK implementation of the revised PSI Directive.

I am a data analyst and consultant with a background mainly in financial services. I have experience of licensing public sector data for commercial use, and am also an active member of the open data community. I am responding to this consultation in an individual capacity.

Below are my views on the specific questions in the consultation document.

Article 4 - redress

Question 1

Do you agree that this represents the most appropriate way to deliver the means of redress required by the amending Directive?

If you do not agree, what do you think would be suitable alternative and why?

The Government proposes to retain the Office of Public Sector Information (OPSI) as the investigative body, with referral to a First-tier Tribunal (FTT) for a legally binding decision.

I do not completely agree that this approach represents the most appropriate way to deliver redress. In my view the investigative body should be able to make decisions that are binding in the first instance, with a right of appeal to the FTT.

If I understand the Government's proposal correctly, the decisions of the investigative body would remain recommendations, non-binding on the PSI holder, unless the applicant sought redress from the FTT. If the PSI holder refused to follow the investigative body's recommendations, the applicant would have to apply to the FTT for a binding decision -- even if the applicant had no quarrel with the substance of the recommendations. The applicant may be charged a fee and may risk an award of costs.

Such an arrangement would be imbalanced. While the review body itself might be impartial, the complaints process would retain some of the existing structural bias in favour of the PSI holder. This approach is contrary to the intention and spirit of the revised Directive.

I do favour retaining OPSI as the investigative body, provided it can be given the necessary independence to make decisions that are binding subject to appeal.

I believe there is a slightly stronger argument for retaining OPSI as the investigative body than there is for transferring that role to the ICO or CMA. Those authorities already have wide-ranging responsibilities and my concern is that the handling of PSI complaints should be given sufficient priority and attention.

Question 2

Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions made under the amending Directive?

Yes, with respect to appeals against the substance of decisions made by the investigative body. As stated in my previous response I do not believe applicants should need to seek redress from the FTT merely to obtain a binding decision.

Question 3

Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals?

Yes.

Article 6 - charging options

Question 4

Do you have any comments about the proposed approach to laying down criteria for the calculation of charges in cases where charges above marginal cost are made?

It is difficult to provide a meaningful response to this question without seeing the wording that the Government proposes to include in the implementing regulations.

I note that the final revised PSI Directive provides substantially wider latitude for charging above marginal costs than did the original proposals put forward by the European Commission in 2011. I further note that those amendments were, in the main, proposed and secured in committee by the United Kingdom.

I urge the Government to take an approach to implementation of the Directive that reflects the Government's open data policy and the G8 Open Data Charter, rather than its previous negotiating stance. The Government should lay down criteria for calculation of charges that allow charging above marginal cost only where required to recoup the costs of reproduction, provision and dissemination for re-use, or to support the provision of added value beyond the public task of the PSI holder.

Such an approach to implementation would prevent UK public bodies from charging for re-use in some circumstances where that charging is allowed by the final revised PSI Directive itself. However this approach would not interfere with the policy goals of the Directive, nor would it create any regulatory constraint outside the public sector, so is unlikely to be challenged as "gold-plating" of the Directive.

I was concerned to read in the consultation document that work has yet to be progressed on the potential need for amendment to the datasets provisions of the Freedom of Information Act. At the moment the Fees Regulations to that Act, introduced last year, seem to provide latitude for charging for re-use that goes beyond the scope of the revised PSI Directive – whatever the detail of the Directive's implementation. It is important the Fees Regulations are amended so that they are compatible with any criteria for calculation of charging laid down in the new PSI regulations.

General question

Question 5

With reference to the impact assessment, are there any other impacts, benefits or implications of the proposals which should be considered?

I have several comments on the analysis in the impact assessment.

It is unclear whether the Government intends to maintain the Advisory Panel on Public Sector Information (APPSI), either as a body enabled by regulations (as now) or in a less formal capacity. It is also unclear whether the Government intends to maintain the Information Fair Trader Scheme (IFTS), which sets and assesses standards for PSI holders.

Both of those decisions are likely to affect the assumptions in the impact assessment and the efficacy of any redress mechanism set out in the PSI regulations.

I question the assumption that the volume of complaints against PSI holders is likely to remain unchanged. The historical level of complaints may have been artificially depressed by the Government's apparent decision to obscure the availability of the existing OPSI complaints process. There is now a growing awareness of the economic potential of re-use of public sector data. If the new redress mechanism is suitably publicised it might be more popular than the existing process, because of the availability of legally binding decisions against PSI holders.

I also think the impact assessment may not sufficiently reflect the possibility of further policy changes emerging from discussions around the National Information Infrastructure and the open data agenda.

Some of the figures and other material in the impact assessment seem to be rather out of date. For example the statement that the Open Government Licence has "been adopted across the public sector, for instance being used for 86% of datasets published via the government's data.gov.uk portal" is based on a report published in April 2012. Since then the Cabinet Office has developed a more comprehensive inventory of public data assets; currently only 59% of the datasets catalogued on Data.gov.uk are subject to the OGL. The impact assessment may be based on an over-estimate of the extent to which public sector data is available under an open licence,

and may therefore be understating the potential for disputes that fall under the PSI regulations.

On the other hand it is possible that this Government or the next might follow through on development of the NII by making changes to the trading fund status of one or more of the Public Data Group bodies, or take other measures to replace charging for re-use with an open data approach. We have recently seen a movement in that direction by the Environment Agency, for example. In my view the revenue estimates in the impact assessment do not adequately reflect the uncertainties in this area of policy.