

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

Executive Summary:

The Open Data User Group (ODUG) is an independent advisory group to the Government on the release of Public Sector Information (PSI) as Open Data for economic benefit. ODUG members are volunteers chosen to represent all sectors of the data user community including individuals, voluntary groups, and both public and private sector organisations. ODUG provides evidence of the real-world demand for open data and works across public sector information holders (PSIHs) to promote the release of public datasets as open data. ODUG also has strong interest in the delivery of a robust National Information Infrastructure (NII).

ODUG thanks The National Archives for the opportunity to comment on the UK Government's proposed implementation of the amended EU Directive on the re-use of public sector information (Directive 2013/37/EU) (PSI Directive) <https://www.gov.uk/government/consultations/uk-implementation-of-directive-201337eu-on-the-reuse-of-public-sector-information>

ODUG agrees in principle with three of the main changes in the amending directive to:

- make permitting re-use of PSI mandatory in most cases;
- extend the PSI Directive's scope to cover PSI held by public sector museums, libraries (including university libraries) and archives where they allow their information to be made available for re-use; and
- introduce a means of redress operated by an impartial review body with the power to make binding decisions on public sector bodies.

ODUG has reservations about the possibility for exceptional charging, as set out below, especially in the context of the current mechanisms used to determine and regulate these charges:

- introduce the principle that charges for re-use should be set at marginal cost, with exceptions in certain circumstances.

ODUG shares the concerns raised by the ODI about the proposed detailed implementation of the amending directive, namely that the UK Government's proposed implementation of the 2013 PSI Directive is a backward step, out of sync with existing initiatives introduced by OPSI as well as the prevailing Open Data policy led by the Cabinet Office. We agree that the proposals are disproportionately focused on reducing burdens on the public sector, rather than facilitating an optimal environment for data re-use. We also agree that this approach loses sight of the broader policy objective to open up public data: encourage economic growth, enhance government transparency and accountability and uncover new social and environmental benefits. We fear that allowing PSIHs to charge for essential NII data which is

available at marginal cost elsewhere in Europe will have a negative impact on the efficiency of the UK economy.

Article 4: Redress

ODUG supports the aim of the Government's proposed redress mechanism: to ensure that decisions on complaints about the re-use of public information are legally binding. Furthermore, ODUG believes that the regulator should have more power at an earlier stage of the process than it does currently, with the ability to make binding enforceable decisions and that such decisions should be referred to tribunal promptly should the complainant or the PSIH wish to challenge them. The tribunal process should be an open and transparent mechanism which is able to hold the regulator to account for poor decision-making or poor practice and also to enforce good regulatory decisions.

***ODUG Recommendation:* Empower an existing regulator to make legally binding decisions with appeal to a First-tier Tribunal. ODUG believes the Information Commissioner's Office is best placed to exercise this role. This will reduce cost and efficiency burdens for both re-users and public sector bodies.**

Article 6: Charging options

ODUG is concerned by a lack of clarity regarding charges for re-use of some (exempted) public information. The current proposal does not define how exemptions for certain public sector bodies are to be granted, and how the additional charges set by these exempted bodies are to be calculated. The proposed implementation seems to reverse existing structures in place for exceptions to marginal cost pricing, which are strictly applied before a public body is able to apply charges. The proposed changes could facilitate greater charging for re-use of public information in the UK than is currently permitted and are contrary to the prevailing Open Data policy led by the Cabinet Office. ODUG proposed that where charges for PSI are levied this should be on an 'open book' basis so the costs incurred to maintain a dataset are open and transparent and any additional charge beyond cost recovery, i.e. charges that generate a surplus used for other purposes, are fully publicly accounted for and justified. In addition the extra costs of implementing and policing any charging regime should be made explicit.

***ODUG Recommendation:* that the Government (a) clarify the calculation by which above marginal costs will be determined, and (b) how this will interact with existing processes for above marginal costs charging under the Government Licensing Framework.**

Article 4 - Redress

Proposal: That the existing investigative body (OPSI) be retained, with referral to a First-tier Tribunal such as the Information Rights jurisdiction, for a legally binding decision.

***Recommendation:* Empower an existing regulator to make legally binding decisions with appeal to a First-tier Tribunal. ODUG believes the Information Commissioner's Office is best placed to exercise this role. This will reduce cost and efficiency burdens for both re-users and public sector bodies.**

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?*

No. ODUG's view is that the current system is cumbersome and ineffective and adding to it in this way will not improve the efficiency or efficacy of the regulatory process. There are currently three stages in the OPSI complaints process:

- Stage One: Resolution with originating public sector body
- Stage Two: Appeal to the Office of Public Sector Information (OPSI)
- Stage Three: Appeal to the Advisory Panel on Public Sector Information (APPSI)

It is not clear how the proposed referral of decisions to a First-tier tribunal will interact with the existing redress processes.

ODUG would like to draw attention to the inadequacy of the current process by reference to the recent complaint made to OPSI by 77M Ltd. (77M) where, despite recommendations made in favour of the complainant, no substantive result has been achieved to meet these recommendations. This has led to 77M making an escalated complaint to APPSI. Because of the way in which 77M complained (probably due to a misunderstanding of the process) the recent APPSI response makes observations rather than recommendations about the underlying problem of claimed unfair pricing by the Ordnance Survey. In this instance all parties involved understand fully that OS pricing, based on a 'derived-data' claim over Land Registry data is the underlying issue yet the ongoing process, which has taken two years so far and has yet to conclude satisfactorily, has been bogged down with bureaucracy with various public sector parties dodging the real issues and hiding behind process. This has resulted in a lengthy process, expensive to the public purse and, to-date, ineffective.

This is a result of OPSI not having any real power as a regulator. It is not a fully independent body with the power to make binding decisions. Furthermore there is no enforcement mechanism available to OPSI if OPSI recommendations are in favour of the complainant but the PSIH does nothing. So the current regulator has little power over those it regulates and/or is unwilling to use the powers it has.

In the example provided a 'First-tier tribunal' on top of the existing complaints process would result in yet more delay and increased costs for both the public sector bodies and data re-users involved, and could act as a chilling factor on PSI re-use. The worst outcome of an amendment to the existing redress mechanism in the UK would be one that further suppresses potentially innovative new uses of public data.

The [last audit](#) of the OPSI complaints process undertaken by APPSI panel member Phillip Webb in 2011 indicated that the time frame for resolution of complaints [as of 2011] varied between 1 to 325 days.¹ 64% of complaints to OPSI were resolved within 7.4 days, with 36% moving on through the full complaints process.² With one third of complaints seemingly requiring protracted resolution, ODUG fears that continuing with a lengthy and ultimately non-binding process with OPSI will discourage PSI re-use.

Since its amalgamation with The National Archives (TNA), the identity and visibility of OPSI has been obscured. In his 2011 audit of the OPSI complaint process, Webb recommended that clear statements be provided on the TNA website and in other relevant places on legislation.gov.uk establishing the status of OPSI and its relationship with TNA (Recommendation 3).³ Today, The TNA website still does not clearly establish its relationship with OPSI, which can be confusing for re-users trying to exercise their redress abilities under the Regulations. OPSI is similarly invisible on GOV.UK. Also, TNA is a major information holder in its own right, which can be perceived to be a source of conflict for OPSI exercising its complaints resolution role. To continue to occupy this role, safeguards must be put in place to ensure OPSI's responsibilities are not obscured by any conflict of interest with TNA.

ODUG agrees with the ODI that the best way of implementing the amended PSI Directive is to provide an independent regulator with power in legislation to enforce decisions on the re-use of PSI. As APPSI said in their response to the PSI Directive Consultation⁴

¹ <http://www.nationalarchives.gov.uk/documents/opsi-complaints-process-audit-report.pdf> p8

² *ibid.*

³ Above n 2, 7.

⁴ <http://www.nationalarchives.gov.uk/documents/APPSI-PSI-Directive-Consultation-Response-2010.pdf>

“one of the problems experienced by private companies is the absence of real sanctions that could be applied in cases where PSBs [public sector bodies] are non-compliant”

The Information Commissioner’s Office (ICO), the established independent authority whose mission is to uphold information rights in the public interest,⁵ is well placed to provide such independent regulation. ICO already rules on complaints under the Data Protection Act 1998 and the Freedom of Information Act 2000, among other areas of legislation. This would align the regulatory regime for re-use of information with the regime for access, which is particularly relevant since the “Right to Data” introduced in the Protection of Freedoms Act 2012.

While ICO lacks experience with regulating PSI re-use, the recent review by APPSI following a complaint about OPSI by 77M⁶ highlights the fact that OPSI lacks the necessary technical expertise:

“The Board acknowledges OPSI’s long history of furthering the cause of re-use of Public Sector Information. However some of the issues that are now being encountered (as evidenced in this report) are increasingly technical, even arcane and vary from one data domain to another. For this reason we urge OPSI to draw upon external experts on a contracted basis to provide the necessary detailed technical knowledge, background and other expertise not readily available from OPSI’s internal resources. The Board Recommends that OPSI establishes a contracted panel of external business and technical experts on which it can readily call for assistance when addressing these more complex commercial and technical issues. This might operate by employing a model similar to that used by the Cabinet Office for Major Project and Gateway Reviews.”

ODUG has noted the consideration of this option in the Consultation (Option C) and has concerns regarding possible devolution of complaints related to Scottish public sector bodies being routed through the Scottish Information Commissioner’s Office. ODUG has confidence in the ability of Scotland’s Information Commissioner’s Office to work with the ICO, with both authorities sharing the same mission: to uphold information rights in the public interest.

For these reasons, ODUG believes that:

- **The Information Commissioner's Office is best placed to rule on and enforce decisions regarding re-use of public sector information.**

⁵ http://ico.org.uk/what_we_cover

⁶ <https://www.nationalarchives.gov.uk/documents/information-management/appsi-review-board-report-77M-september-2014.pdf>

- **Regardless of which body regulates in this area, it needs to have the power to make binding, enforceable decisions.**

ODUG further recommends that:

- **The entire process of complaint, regulatory response, possible challenge and enforcement should itself be fully open and transparent.**

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. ODUG agrees that a First-tier Tribunal should have the power to challenge the regulators decisions, enforce decisions which are upheld and award costs against claims deemed unreasonable,⁷ which is standard practise in other regulatory environments and should deter bogus complaints. ODUG recommends that the potential costs should be kept to a minimum, with a cap on the maximum which can be levied against an individual or a small business. Full costs should be awarded against public sector bodies in the event of a successful appeal as this may stimulate a greater release of information in the first place, and reduce the need for Tribunal proceedings. All Tribunal outcomes should be published.

However, ODUG believes that appeals to a First-tier Tribunal should be minimised by ensuring that it is possible for a complainant to get a legally binding decision earlier in the process, as described in our answer to Question 1.

Question 3 *Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals? The General Regulatory Chamber Rules may be found at: <http://www.justice.gov.uk/tribunals/rules>*

ODUG agrees with the ODI's first preference for an independent authority with an existing investigative function that can hear complaints on re-use and make binding decisions. The ICO already exercises this function for complaints under the FOI regime, and is well placed to exercise a similar function for complaints on data re-use. Relevant resources from OPSI could be transferred to the ICO to assist with this function and/or ICO could draw on an external panel of experts, as APPSI recommended that OPSI do (see response to Question 1 above).

In the event an existing regulator like ICO is not utilised, the General Regulatory Chamber Rules (GRCR) must be adjusted or wielded in a way that does not impose excessive cost or

⁷ Rule no 10, Orders for Costs, <http://www.justice.gov.uk/downloads/tribunals/general/consolidated-TPFTT-GRC-Rules2009-6-04-12.pdf>

administrative burdens on complainants, with a process which can be easily followed and which facilitates timely decision making. The GRCR appear too long and complex for the anticipated complaints process. They may deter appeal by individuals, start-ups and SMEs who have limited access to legal advice: exactly the groups who are intended to be the main beneficiaries of PSI available at marginal cost. We reiterate our call that the potential cost of a complaint to an individual or small business should be capped.

Article 6 - Charging options

Proposal: That where charges above marginal costs are made, such charges should be calculated according to objective, transparent and verifiable criteria in UK legislation. The total charge should not exceed the cost of collection, production, reproduction and dissemination together with a reasonable return on investment.

Recommendation: that the Government (a) clarify the calculation by which above marginal costs will be determined, and (b) how this will interact with existing processes for above marginal costs charging under the Government Licensing Framework.

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's unclear to ODUG exactly what criteria the Government is proposing to introduce for the calculation of charges above marginal cost. Are the criteria to be, "costs not exceeding the cost of collection, production, reproduction and dissemination together with a reasonable return on investment"? ODUG shares the ODI's fears that such general criteria will enable greater charging for public sector information than is currently permitted. This is directly contrary to the stated aim of the amended PSI Directive: to stimulate greater release and re-use of public sector information.

The existing [Government Licensing Framework](#) sets out 19 rigorous criteria, including 5 mandatory criteria for above marginal costs charging.⁸ Public bodies wishing to charge above marginal costs [must apply to OPSI for an exemption](#) on a case by case basis and demonstrate that they meet these criteria.⁹ Some public bodies can seek accreditation from OPSI to be

⁸<http://www.nationalarchives.gov.uk/documents/information-management/criteria-exceptions-marginal-cost-pricing.pdf>

⁹<http://www.nationalarchives.gov.uk/documents/information-management/exception-to-marginal-cost-pricing-application-guidelines.pdf>

excluded from this case-by-case criteria under the [Information Fair Trader Scheme](#).¹⁰ Again, there are strict requirements for a public body to be registered under the IFTS.

The existing framework is not perfect. The list of [registered IFTS members](#)¹¹ (who can charge above marginal cost recovery) includes public bodies with stewardship of core reference datasets - like the Met Office, Ordnance Survey and Land Registry - which hold significant potential if released as open data. The Public Administration Committee (PASC) report on [Statistics and Open Data](#),¹² released in March 2014, highlights the need for a “radical new approach to the funding of government open data”:

“A modest part of the cost to the public of statutory registrations should be earmarked for ensuring that the resultant data - suitably anonymised if necessary - can become open data. Data held by the Land Registry and car registration data held by DVLA and, indeed, Care.data held by the NHS are among relevant examples.” (paragraph 75)

UK implementation of the PSI Directive should build on the recommendations contained in PASC’s 2014 report, and the existing mechanisms in place. At the very least, it could enshrine existing mechanisms in the Regulations, to require approval from the regulator before a public body is able to charge for re-use above marginal cost. ODUG shares ODI’s fears that instead the UK’s proposed implementation will be a backwards step.

ODUG also believes that the fact that certain PSIHs (Trading Funds) have a business model mandated by the Shareholder Executive and the Treasury, that appears to demand that the agencies maximise surplus has been internalised by OPSI as an acceptance of a restrictive high price/low volume business model for data sales. OPSI’s judgments in the past appear to demonstrate that they view the business model as an acceptable reason for PSIHs failing to release PSI at a price, or on a basis, reasonable to complainants. There has been little consideration of potential price elasticity in the market, or the wider market opportunities available to the Trading Funds.

This is absolutely counter to a desirable aim which should be “to maximise the use of Public Sector Information to benefit the citizen, good governance and commerce”. It also runs counter to the European INSPIRE initiative which aims to ensure that data is “collected once and used

¹⁰<http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/ifts-and-regulation/ifts-verification-process/>

¹¹<http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/ifts-and-regulation/ifts-members/>

¹²<http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/news/statistics-and-open-data-response/>

many times". Current regimes lead to waste and economic disadvantage because data deemed to be too expensive from the PSIH, is recaptured at further cost to the economy. A recent example of this was the initiative by Royal Mail, prior to its part-privatisation, which consumed some £10 - £20 million of public resources to reconstruct a data set (RM Pinpoint) already commercially available from Ordnance Survey (OS AddressBase). Any charges levied for PSI and, especially, for essential NII data, should factor in the wider economic benefits of making data available at low cost and under generous terms, also for the public good and to avoid the previous duplication of efforts to re-create the same data across multiple public bodies; rather than taking a narrow view on contributing to the cost base of maintaining an individual public sector organisation in isolation.

Question 5 *With reference to the Impact Assessment, are there any other impacts, benefits or implications of the proposals which should be considered?*

The Impact Assessment (IA) currently sets very low expectations of how many people will seek to appeal re-use decisions, and how much the tribunal process will cost. ODUG believes that, currently, there are fewer appeals to OPSI than might be expected because people have little faith in OPSI's ability to act.

Also, if the proposed charging criteria result in greater charging for the re-use of information, there could be more appeals. However, increased costs combined with the potential complexity of the proposed tribunal appeal process might put people off appealing re-use decisions altogether. This would be the worst outcome, and furthest from the aims of the PSI Directive and is why ODUG recommends a cap on the maximum potential cost of a compliant to an individual or small business.

The [IA assumes](#) there will be no change in the volume of complaints and that a tribunal will require 7.7 days of panel sitting time.¹³ This assumption seems to be based on Webb's 2011 audit report of OPSI complaints, and doesn't take into account the potential for increased appeals if the proposed amendments allow more public sector charging for information particularly given the expectation, moving forward, that the number of PSI users will increase and the potential for an improved awareness of the complaints mechanism across a larger number of data users.

The IA also incorrectly estimates the time costs of a tribunal hearing. Webb's 2011 audit of the OPSI complaints process indicated that while 64% of complaints were resolved by OPSI within

¹³ <http://www.nationalarchives.gov.uk/documents/information-management/impact-assessment.pdf> p2

7.4 days, these were *prior to moving through the full complaints process*.¹⁴ The one third of complaints that did move through formal OPSI processes could take up to 325 days to reach a recommendation. The IA contemplates redress to a tribunal being available *after* OPSI has made its recommendation, which will add further delays to the process.¹⁵

The IA should take into account the potential impact of changes to existing cost charging criteria (if this is proposed), and potential increased likelihood of appeals as a result.

The IA should also seek comparative data from other regulators as an improved evidence base for its estimates of the timing and costs of a tribunal hearing. ODUG would like to suggest that, in the example of the 77M complaint (cited previously) the costs to all parties, were they calculated, would far exceed the costs of a straightforward tribunal.

Other Comments

The National Archives should publish a draft of the regulations prior to implementation. It is unclear from this Consultation exactly how the UK is intending to update its existing Regulations. We look forward to an opportunity to review the proposed regulations.

The Consultation Document also indicates there may be a need for amendment to the provisions on the release and re-use of requested datasets under the Freedom of Information Act 2000 (FOIA) as amended by section 102 of the Protection of Freedoms Act 2012. Is the National Archives able to give any indication as to when a consultation on this process will take place? ODUG would be pleased to contribute to this.

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Chair ODUG

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¹⁴ above n2.

¹⁵ Paragraph 5.6, above n. 11.