

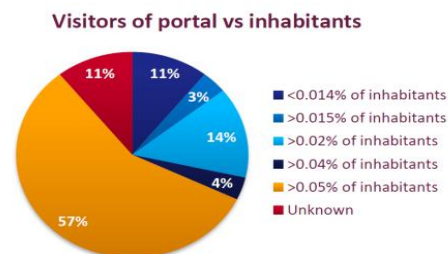
## EARTO Analysis of EC Proposal revising the EU Directive on the re-use of public sector information

17 July 2018

EARTO is concerned by the EC proposal to revise the PSI Directive: it seems that the new provisions in respect of Research Data are not well implemented and often seem “out of place” and “out of phase” with the parts that were derived from the existing PSI-Directive. EARTO advises the European Institutions to re-consider adding Research Data to this directive and keep as for the first Directive a limited scope to only opening public government data.

The extension of the PSI Directive to Research Data is not welcome due to the following:

- First, looking at [our last analysis](#) on Openness of Government Data and Innovation Performance, we already know that there is no correlation between the openness of governmental data and the innovation performance of a country. We do not understand this proposal as adding to our EU competitiveness as already stated by few of our key European industrial partners<sup>1</sup>.
- Second, the EC proposal considers that the research data are public data (governmental data) like the others, which is not the case in any other (competing) part of the world. In today’s context with a clear closure of research data in China<sup>2</sup> (like other governmental data), and an always balanced opening of Research Data in the US (under Obama as well as under Trump’s administrations, [see our Background Note on the US policy](#)), the EC proposal is difficult to understand.
- Third, the latest public information published by the [World Wide Web Foundation](#)<sup>3</sup> related to open governmental data shows a net decline in countries that used to be the most advanced in terms of data openness, including in European Nordic countries. It shows that the first pilots promoting opening of governmental data are not convincing. The WWW Foundation even concludes: « *The open (governmental) data movement is at a turning point...it could fade into a ghost town of abandoned pilots, outdated data portals, and unused apps* ». Accordingly, with the first target of governmental data not even reached by the current PSI Directive, we do not see the need to add research data to the mix knowing it could in many cases only negatively impact those working with research data today, especially in applied research.
- Finally, one of the arguments given for openness of data is the fact that citizens must be able to access such data. The latest information also shows the very limited impact in terms of citizens access and interest to such data. Indeed, the data published by [the European data portal](#) show a very limited interest by citizens as well as private companies to access such data via the public portals made available:



Source: [the European data portal](#)

<sup>1</sup> See [Digital Europe](#) & [Business Europe](#) Positions.

<sup>2</sup> See [Financial Times](#).

<sup>3</sup> The World Wide Web Foundation measures the openness of government data (excluding research data) around the world and ranks countries according to their degree of openness to government data: see their [recommendations](#) and [data and https://opendatabarometer.org/doc/3rdEdition/ODB-3rdEdition-GlobalReport.pdf](https://opendatabarometer.org/doc/3rdEdition/ODB-3rdEdition-GlobalReport.pdf).

In this context, EARTO would like to highlight the importance of at minimum adapt the following text:

PSI Directive Revision			
Topic	Revised PSI Directive Text & Article	Analysis	Text Changes Proposed
<b>Open Access Policy by MS</b>	<p><b>(24)</b> For the reasons explained above, it is appropriate to set an obligation on Member States to adopt open access policies with respect to publicly-funded research results and ensure that such policies are implemented by all research performing organisations and research funding organisations. Open access policies typically allow for a range of exceptions from making scientific research results openly available. On 17 July 2012, the Commission adopted a Recommendation on access to and preservation of scientific information, updated on 25 April 2018<sup>34</sup>, and describing, among other things, relevant elements of open access policies.</p> <p>Additionally, the conditions, under which certain research results can be re-used, should be improved. For this reason, certain obligations stemming from this Directive should be extended to research data resulting from scientific research activities subsidised by public funding or co-funded by public and private-sector entities. However, in this context, concerns in relation to privacy, protection of personal data, trade secrets, national security, legitimate commercial interests and to intellectual property rights of third parties should be duly taken into account. In order to avoid any administrative burden, such obligations should only apply to such research data that have already been made publicly available by researchers. Other types of documents held by research performing organisations and research funding organisations should continue to be exempt from the scope of application of this Directive.</p>	<p>The term "results" is not defined in article 2 "Definitions", as "research data" is defined. Furthermore, the definitions of "results", "Research Data" and "Documents" should be consistent with each other. Also, it seems that terms are sometimes used in their defined sense, and in other places in a more generic sense. This should be clarified.</p> <p>This directive must be compliant with other European policy documents, for example:</p> <ol style="list-style-type: none"> <li>1. The Commission principle "<i>as open as possible, as closed as necessary</i>" in the Framework Programme</li> <li>2. Article 14 in the Council conclusions on the transition towards an Open Science system, adopted by the Council at its 3470th meeting held on 27 May 2016; Brussels, 27 May 2016 (OR. en) 9526/16 RECH 208 TELECOM 100 stating that "<i>Optimal reuse of research data 14. UNDERLINES that research data originating from publicly funded research projects could be considered as a public good, and ENCOURAGES the Member States, the Commission and stakeholders to set optimal reuse of research data as the point of departure, whilst recognising the needs for different access regimes because of Intellectual Property Rights, personal data protection and confidentiality, security concerns, as well as global economic competitiveness and other legitimate interests. Therefore, the underlying principle for the optimal reuse of research data should be: "as open as possible, as closed as necessary"</i>".</li> </ol>	<p><b>Change text in paragraph 24 to:</b> It is appropriate to set an obligation on Member States to adopt <b>or stimulate</b> open access policies with respect to publicly-funded research <b>data results compliant with the Commission principle and the Council conclusions on optimal reuse of research data: "as open as possible, as closed as necessary"</b> and ensure that such policies are implemented by all research performing organisations and research funding organisations. <b>Moreover, this obligation is limited to research data that has already been made openly accessible as a result of obligations under national law or resulting from agreements with research funding bodies.</b></p>

		<p>3. Paragraph 24 must also be compliant with the subsidiarity principle recalled in page 4 of this proposal for a directive: <i>"On the other hand, for scientific information, the proposal limits itself to ensuring legal re-usability of research data and only such research data that has already been made openly accessible as a result of obligations under national law or resulting from agreements with research funding bodies. It does not extend one uniform set of rules on how to ensure access to and re-use of all scientific information, but leaves this to Member States to define"</i>.</p>	
<p><b>Open Access Policy by MS.</b></p>	<p><b>Article 10 - Availability and re-use of research data</b>  1. Member States shall support the availability of research data by adopting national policies and relevant actions aiming at making publicly funded research data openly available ('open access policies'). These open access policies shall be addressed to research performing organisations and research funding organisations.  2. Research data shall be re-usable for commercial or non-commercial purposes under the conditions set out in Chapters III and IV, insofar as they are publicly funded and whenever access to such data is provided through an institutional or subject-based repository. In this context, legitimate commercial interests and pre-existing intellectual property rights shall be taken into account. This provision shall be without prejudice to point (c) of Article 1(2).</p>	<p>It is necessary to specify that "Only research data which was voluntarily published / put in a data repository for open access by researchers should be in the scope of this paragraph" which was also in recital 24 of the regulation.</p>	<p><b>Add text in Article 10:</b>  1. Member States shall support the availability of research data by adopting national policies and relevant actions aiming at making publicly funded research data openly available ('open access policies'). These open access policies shall be addressed to research performing organisations and research funding organisations. <b>Only research data which was voluntarily published / put in a data repository for open access by researchers should be in the scope of this paragraph.</b>  2. Research data shall be re-usable for commercial or non-commercial purposes under the conditions set out in Chapters III and IV, insofar as they are publicly funded and whenever access to such data is provided through an institutional or subject-based repository. In this context, legitimate commercial interests and pre-existing intellectual property rights shall be taken into account. This provision shall be without prejudice to point (c) of Article 1(2). <b>Only research data which was voluntarily published / put in a data repository for open access by researchers should be in the scope of this paragraph.</b></p>

<p><b>High-value Datasets</b></p>	<p><b>Article 13 List of high value datasets</b></p> <p>1. With a view to achieving the objectives of this Directive, the Commission shall adopt the list of high value datasets among the documents to which this Directive applies, together with the modalities of their publication and re-use.</p> <p>2. These datasets shall be available for free, machine-readable and accessible via APIs. The conditions for re-use shall be compatible with open standard licences.</p> <p>3. By way of exception, the free availability referred to in paragraph 2 shall not apply to high-value datasets of public undertakings if the impact assessment referred to in Article 13(7) shows that making the datasets available for free will lead to a considerable distortion of competition in the respective markets.</p> <p>4. In addition to the conditions set out in paragraph 2, the Commission may define other applicable modalities, in particular</p> <ul style="list-style-type: none"> <li>a. any conditions for re-use;</li> <li>b. formats of data and metadata and technical modalities of their publication and dissemination.</li> </ul> <p>5. The selection of datasets for the list referred to in paragraph 1 shall be based on the assessment of their potential to generate socio-economic benefits, the number of users and the revenues they may help generate, and their potential for being combined with other datasets.</p> <p>6. The measures referred to in this Article shall be adopted by the Commission by means of a delegated act in accordance with Article 290 of the TFEU and subject to the procedure laid down in Article 14.</p> <p>7. The Commission shall conduct an impact assessment including a cost-benefit analysis prior to the adoption of the delegated act and ensure that the act is complementary to the existing sector based legal instruments with respect to the re-use of documents that belong to the scope of application of this Directive. Where high value datasets held by public undertakings are concerned, the impact assessment shall give special consideration to the role of public undertakings in a competitive economic environment.</p>	<p>Defining high-value data sets would mean that there are low-value data sets, which, with some exceptions, do not deserve to be distributed, or even managed, because of the costs involved, the associated administrative burden and the low expected social-economic benefits.</p>	<p><b>Delete article 13</b></p>
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<p><b>Charging Marginal Costs</b></p>	<p><b>Memorandum page 1:</b> They include provision of real-time access to dynamic data via adequate technical means, increasing the supply of high-value public data for re-use, preventing the emergence of new forms of exclusive arrangements, limiting the use of exceptions to the principle of charging the marginal cost and clarifying the relationship between the PSI Directive and certain related legal instruments.</p> <p><b>Text page 7:</b> <i>Charging:</i> tighten the rules for Member States for invoking the exceptions to the general rule that public sector bodies cannot charge more than marginal costs for dissemination.</p> <p><b>Extract recital 32:</b> “In exceptional cases, However, the necessity of not hindering the normal running of public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks <del>or of the costs relating to the collection, production, reproduction and dissemination of certain documents made available for re-use</del> should be taken into consideration”</p>	<p>When a public body wants (or is constrained to) make data available in an open way, of course, the data must be well managed, maintained, stored, formatted, in appropriate formats and standards so that those who There will be free access to it easily. Of course, all this work of preparing and distributing the data so that it can be opened (where relevant) is cost-consuming. For example, in the case of research data, employees of the bibliographic services or others charged with this, will spend time there. One of the objectives of the revision of the PSI Directive, to limit the costs of access to open data, is to limit the case where the public bodies can use the full costs compared to the marginal costs (marginal costing) for the cost of distributing the data when you have decided (or you have to) to disseminate them, because the marginal costs are much cheaper than the full costs. The marginal costs are the costs other than the salaries of the employees of the public bodies employing civil servants.</p> <p>In short, covering marginal costs principle would demotivate research organisations to open their datasets because they would not be able to charge the time that their full-time employees would spend for datasets distribution.</p>	<p><b>Ensure this principle is only meant for opening government data and not research data (also in article 6 “principle governing charging).</b></p>
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EARTO and its experts remain of course ready to further discuss these recommendations with the European Institutions’ representatives.

**RTOs - Research and Technology Organisations**

*From the lab to your everyday life. RTOs innovate to improve your health and well-being, your safety and security, your mobility and connectivity. RTOs’ technologies cover all scientific fields. Their work ranges from basic research to new products and services’ development. RTOs are non-profit organisations with public missions to support society. To do so, they closely cooperate with industries, large and small, as well as a wide array of public actors.*

**EARTO - European Association of Research and Technology Organisations**

*Founded in 1999, EARTO promotes RTOs and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represent 150.000 highly-skilled researchers and engineers managing a wide range of innovation infrastructures.*

**EARTO Working Group Legal Experts:** *is composed of 43 corporate legal advisers working within our membership. Established in autumn 2013, this Working Group has also worked on the revision of the state aid rules & the GBER. Our experts also contributed to the setting-up of the DESCA Consortium Agreement model for Horizon 2020. More recently they were at the origin of the EARTO Paper on Open X, the EARTO Background Note on the US Federal Agencies Data Sharing Policies, and the EARTO Position Paper on the European Licencing Framework for Standard Essential Patents.*

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