

Ministry of Justice

Letter from Helen Grant to the Chair

18555/11 PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE 2003/98/EC ON THE RE-USE OF PUBLIC SECTOR INFORMATION

Following my letter of 28 March 2013, I am writing to update you on the agreed draft text between the European Parliament and the European Council, to highlight how the text meets the Government's aims for the negotiations and to seek clearance of this dossier from scrutiny. Subject to obtaining clearance, my aim would be for the Government to signal the UK's agreement to adoption of this text.

18555/11 was considered in the European Scrutiny Committee's 16^h Report of Session 2012-13 on 24 October 2012. The Committee agreed with the Government that there should be greater flexibility shown to cultural organisations, so that they are not overburdened by administrative requirements arising from the Directive, and so that the current digitisation of cultural records is not hampered in the future by limiting how access to these resources is charged. The Committee also agreed there was a need to clarify the rules for when public bodies can charge above marginal costs.

Lord McNally and I, as Justice Ministers responsible for the re-use of public sector information, wrote to the Committee with updates on 10 July 2012, 27 November 2012 and 28 March 2013. In my most recent letter, I highlighted the progress made during the negotiations and how several key UK policy concerns had been met. These concerns included the principles for making public sector information available for re-use and the revised definition on public task.

I now wish to update the Committee on the outcome of negotiations on the outstanding issues discussed at the final trilogue at the end of March. These relate to the role of the impartial review body, the rules on charging and the rules on exclusive agreements for museums, libraries (including university libraries) and archives.

Please find attached at Annex A, for your information, the proposed final text of the Directive. The UK negotiating position has delivered a successful outcome on this dossier and that these issues have been addressed. I outline the final outcomes reached on our key issues below.

Charging by public sector bodies within the scope of the Directive (Article 6)

The compromise text retains the UK's flexible approach to charging and keeps within the spirit of the open data and transparency agenda. This is a crucial balance. The Directive establishes a principle of marginal cost as the general default for allowing re-use of public sector information. However, there are appropriate safeguards for trading funds and other

public sector bodies that are required to generate a substantial part of their costs for the information. The Directive also recognises the need for a flexible approach on charging for archives, libraries and museums.

Significantly, the text also enables other public sector bodies (for example, those that are not trading funds or cultural bodies) to be able to charge above marginal cost for the collection, production, reproduction and dissemination of public sector information, where appropriate, within a proportionate check and balance system. This system will reflect that operated at present for central government under Crown copyright management and the UK Government Licensing Framework.

Prohibition of exclusive arrangements and the expansion of scope to museums, libraries (including university libraries) and archives (Article 11)

This is a key issue for museums, libraries (including university libraries) and archives, particularly in the context of digitisation projects. The UK has been successful in negotiating and achieving the general ten year period for exclusive arrangements where necessary. Therefore organisations are permitted to enter into exclusive arrangements, for example, on costly digitisation projects, provided that the term of exclusivity does not exceed ten years.

Role of the independent authority with regulatory powers

The Directive makes provisions for Member States to establish an ‘impartial review body’ which can consider complaints and can make binding decisions. This change in wording from ‘independent authority’ is significant in that it avoids the unnecessary burden of establishing a separate body or moving away from the proportionate regulatory model already in operation in the UK.

The reference to the impartial review body’s decisions being binding reflects the strong push from the Commission and other Member States to provide an enforcement mechanism. This will strengthen the right of re-users to seek to enforce a favourable decision of the review body. The outcome is a positive one for the UK in that we can adapt the existing regulatory framework without having to establish a new national competition authority or national judicial authority, to investigate complaints.

Timing

The Presidency asked the Committee of Permanent Representatives (Coreper) to signal their agreement to the final compromise text on 10 April 2013. The Directive is scheduled for a plenary vote in the European Parliament on 11 June 2013. As the Transport, Telecommunications and Energy Council meets 6-7 and 10 June 2013, the Directive is likely to go to another Council for adoption after the European Parliament plenary vote. It is as yet unclear which Council meeting this may be.

Impact assessment

You requested to be sent an updated impact assessment based on the final text of the Directive in your letter, dated 24 January 2013. An implementation stage impact assessment

will be produced as part of the transposition process and I will send you a copy as soon as this work is complete, which is expected to be Autumn this year.

30 April 2013

Letter from Helen Grant to the Chair

I am writing to update you on the extent of the agreed text between European Parliament and the European Council in the negotiations so far. This is to signal the outcomes achieved by the UK on this dossier, how UK policy concerns have been addressed and highlight the main outstanding issues in the final stages of the negotiation.

The proposal forms part of the EU 2020 strategy to promote growth in Europe's economies. The proposed Directive seeks to unlock the economic potential of public sector information through amending Directive 2003/98/EC on the re-use of public sector information, which established a minimum set of rules governing the re-use of PSI at European level. The Commission pointed to a lack of awareness and inconsistency of approach across Member States of the 2003 Directive that has hampered the creation of cross-border information products and services.

The key features of the proposal to amend the Directive are as follows:

- to bring museums, libraries and archives (including university libraries) within scope of the Directive;
- to establish the general principle that generally accessible information should be made available for re-use;
- to provide that charges for re-use should in general be limited to marginal costs, with some notable exceptions (such as museums, libraries and archives); and
- to provide a redress mechanism for non-compliance through an independent authority with binding decisions.

The Commission's proposal was generally welcomed by the Government and is broadly in keeping with the UK Government's policy and innovation in the areas of re-use, open data and transparency. Many of the principles outlined in the proposal are already embedded within the open data and public sector information landscape in the UK.

The key issues that the UK wished to address (as highlighted in the Explanatory Memorandum at Annex A) during the course of the negotiations involved: principles for making public sector information available for re-use; charging by public sector bodies within the scope of the Directive; the expansion of the scope to museums, libraries and archives (including university libraries); the role of the independent authority with regulatory powers; and the revised definition of public task. The European Union Committee expressed particular interest in the issues of the charging and redress mechanisms in the emerging text during negotiations.

Negotiations

The trilogue negotiations involving the European Parliament began in December 2012, with the third trilogue scheduled for the end of March. During the first trilogue, the issues fell into three broad categories: first those where the European Parliament and Council's preliminary positions are identical and required no further discussion; second those where the Parliament and Council agreed in principle but needed to find common language and terminology; and third those cases where the Parliament and Council have diverging views. The first two categories of issues have been discussed and resolved. This included the resolution for the principles for making public sector information available for re-use and the revised definition on public task, and I provide updates on these issues below.

For the third category the outstanding issues relate to the role of an impartial review body (the 'independent authority in the original proposal), rules on charging and the rules on exclusive agreements. I have provided further details on these issues below, and will update you on their conclusion once a final text of the proposal is available.

Principles for making public sector information available for re-use

The move towards making accessible information available for re-use is consistent with UK emerging policies on open data and transparency. The Government is satisfied that the latest text makes it clear that only accessible information falls within scope. The Directive therefore excludes information that is exempt under access legislation, and also information in which the intellectual property is owned by a third party. The latter is a key issue for archives, libraries and museums as these bodies hold significant quantities of content subject to third party rights.

Revised definition of public task

The term ‘public task’ is significant in the context of the PSI Directive because it defines whether certain information falls within the scope of the Directive. In negotiations, the UK argued against the definition being limited to what is established in law or other binding rules only, and for moves to remove common administrative practice from the definition. This is because the roles and responsibilities of many UK public sector bodies are not defined legally in this way. The UK has been successful in reinstating common administrative practice to the definition, with the possibility of review from an independent body other than the public sector body in question.

Charging by public sector bodies within the scope of the Directive

The question of charging has proved to be the most contentious and challenging aspect of the negotiations. While the Government could accept that marginal cost pricing should be the default charging mechanism it was essential that we retain sufficient flexibility to ensure that charges can be made for re-use where appropriate. This is particularly the case for public sector bodies, such as government trading funds, which derive a substantial amount of their income from making their information and data available for re-use. The same applies to archives, libraries and museums. The Council, Parliament and Commission recognise and agree that such bodies should be able to charge above marginal costs and the text reflects this.

The UK has also argued strongly in favour of other public sector bodies being able to charge above marginal cost for specific activities or projects giving rise to public sector information where it is appropriate and necessary to do so. This applies in cases where the public sector body does not generate a substantial part of their overall revenue from public sector information but still needs to charge above marginal cost in order to make the information available for re-use. There may be further challenge on this particular exemption from marginal cost. This is the subject of discussions in the third trilogue. I will update you on the outcome following these discussions.

Expansion of the scope to museums, libraries and archives (including university libraries)

The views of cultural sector bodies and representational groups have informed the UK negotiating position. The main issues have focussed on charging and the granting of exclusive rights, especially where the digitisation of cultural resources has been involved.

The current text as agreed in Council meets the UK concerns satisfactorily around charging for museums, libraries and archives. Details regarding the duration of exclusive rights, particularly for digitisation of cultural resources, will be discussed at the third trilogue. Several parties have called for a longer duration than the 7 years in the text, including the UK. I will update you on the outcome following these discussions.

Role of the independent authority with regulatory powers

The proposed amended Directive makes provision for Member States to establish an impartial review body that can consider complaints and forms of redress with binding decisions. The original proposal described this body as the 'independent authority' but many Member States wished to avoid the unnecessary burden of establishing a separate body. Some member states envisaged these activities being handled via a judicial process. The current text is open to the adoption of a proportionate regulatory model such as the one already in operation in the UK.

Devolved Issues

PSI is a reserved issue but negotiations have taken into account consultation and discussion with officials in Scotland, Wales and Northern Ireland.

Timing

Subject to discussions in the final stages of negotiation it is anticipated that the Directive will go forward for the European Parliament plenary vote on 11 June. When the Government receives the final text of the proposal, I will write to you again to update you and seek clearance.

28 March 2013