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Is re-use of public sector information a success story? Challenges of implementing EU directives and functioning of re-use on the example of Poland

/ work in progress/

Introduction

The European Union has been adopting regulations regarding the re-use of public sector information for years. The history of regulation began with Directive 2003/98/EC¹, which was significantly changed in the following years. The next step was the adoption of Directive 2013/37/EU². Finally, Directive 2019/1024 of 20 June 2019³ on open data and the re-use of public sector information is now in force.

The adoption of the directive at the EU level required its implementation by the Member States.

In Poland, the re-use procedure has been regulated since December 29, 2011. Initially, the regulation was included in the Act on Access to Public Information. Then, the Act of February 25, 2016, on the re-use of public sector information was adopted. The latest directive in Poland was implemented in the Act of August 11, 2021, on open data and re-use of public sector information.

The EU legislator, in the light of new challenges, decided to adopt Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information⁴. It has been recognized that “since the adoption of the first set of rules (...) the amount of data in the world, including public data, has increased exponentially and new types of data are being generated and collected. At the same time, there is a constant evolution of technologies for analyzing, using and processing data, such as machine learning, artificial intelligence and the Internet of Things. This rapid technological evolution is enabling the creation of new services and new applications based on the use, aggregation or combination of data.” What is new is the introduction of the concept of open, which refers to “data in an open format that can be freely used, reused and shared by everyone for any purpose”. Directive

¹Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, hereinafter referred to as: “Directive 2003/98/EC”.

²Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, hereinafter referred to as: “Directive 2013/37/EU”.

³Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

⁴Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

2019/1024 was implemented under the Act of 11 August 2021 on open data and re-use of public sector information. Also in the Polish legal system, the regulation of the new institution of "open data" has become a novelty.

In the annual study of the levels of digitization of the European Union Member States (*Digital Economy and Society Index*), Poland occupies the last position. However, it is recognized that in the case of open data, Poland scores "very well"⁵, above the EU average.

The multitude of regulations adopted over the years naturally leads to reflection on whether both the EU regulations and the implementation in the national legal order have had a positive impact on the re-use of public sector information and whether they support the scope of open data.

The research questions that will be explored in the proposed paper are as follows:

- 1) Have the regulations on re-use and open data had a positive impact on the scope of transparency? If so, in what way?
- 2) What challenges are associated with the implementation of the re-use directive in Poland?
- 3) Has the adoption of new directives (amending directives) and the related change in national law influenced the level of transparency in Poland?

Re-use legal framework

The creation of a legal framework for the re-use of public sector information dates to 2003, when Directive 2003/98/EC was. Already at that time, the evolution towards the "information and scientific society" (recital 2 of the Directive) was recognized, making digital content increasingly important. Twenty years ago, it was noticed that the public sector produces a huge range of data that can be used in many other areas, including by entities conducting business activity. The conditions for doing business are inevitably linked to the concept of the internal market, which should offer the possibility of effective cross-border exchange of goods and goods. Therefore, it was diagnosed that "There are significant differences in rules and practices in the Member States regarding the use of public sector information resources, creating barriers to the full economic potential of key documentation resources." The aim of the directive was to provide a common standard for the re-use of public sector information.

The first *reuse* directive defined basic concepts (e.g. the concept of "public sector body" - defining the subjective scope of application of the re-use standard), including the concept of "document", defining the subjective scope of re-use of public sector information. The term "document" defines "any content regardless of the medium used (written on paper or stored in electronic form or recorded in the form of sound, visual or audiovisual)", but also "any part of this content"⁶. The first directive very succinctly defined the general principle *of reuse as* the obligation of EU Member States to ensure that "where re-use of documents held by public sector bodies is allowed, these documents will be re-used for commercial or non-commercial purposes in accordance with the set out in Chapters III and IV". Article 4 of the Directive introduces an obligation for Member States to consider requests for re-use.

⁵ 2022 *Digital Economy and Society Index Poland*, p. 17 (access: <https://ec.europa.eu/newsroom/dae/redirection/document/88756>).

⁶Article 2(3) of Directive 2003/98/EC.

Initially, EU solutions regarding the re-use of public sector information were implemented under the provisions of the Act of 6 September 2001 on access to public information. Pursuant to the Act of 16 September 2011 amending the Act on access to public information and certain other acts, implementing Directive 2003/98/EC, Chapter 2a was added to the Act on Access to Public Information. The provisions of Chapter 2a of the Act were in force from 29 December 2011 until they were repealed pursuant to Art. 32 point 6 of the Act of February 25, 2016 on the re-use of public sector information ⁷, with effect from June 16, 2016.

The implementation of the provisions of Directive 2013/37/EU in Poland was reflected in the adoption of the Act of 25 February 2016 on the re-use of public sector information. It was then decided to transfer the entire scope of *the reuse regulations* to a separate legal regulation in a comprehensive manner, which can be assessed as a good approach in terms of legal certainty and clarity of the scope of application of various information obligations. The implementation of Directive 2013/37/EU was manifested, among others, in the changed scope of entities applying re-use of public sector information.

The development of the legal framework for data opening

The further development of the importance of data in the modern world and the change in the way information is used became the reason for the adoption of Directive (EU) 2019/1024 of the European Parliament and of the Council of June 20, 2019 on open data and the re-use of public sector information. The Directive essentially replaced Directive 2003/98/EC (as amended by Directive 2013/37/EU). The new approach is already visible in the title of the directive, which emphasizes the importance of "open data". As recital 16 of Directive 2019/1024 explains, the concept of open data "generally refers to data in an open format that can be freely used, reused and shared by anyone for any purpose. (...) Member States are encouraged to support the creation of data based on the principle of "open by design and open by default" for all documents falling within the scope of this Directive.'

As with previous legislative interventions at the EU level, a divergence in the practice of individual Member States was recognized and the risk of further widening of this divergence, which would create a barrier to the cross-border use of information.

It is worth emphasizing that the subject of the new directive is to provide not only static access to data (even constantly updated) access to data, but nowadays there is a need for dynamic access: "In order to gain access to data open for re-use under this Directive, it would be useful to provide access to dynamic data through well-designed APIs' ⁸(recital 32). It was emphasized that properly functioning APIs "It also plays an important role in creating valuable ecosystems around data assets that often go untapped. Several principles must guide the configuration and use of an API: Availability, Stability, Lifecycle Maintenance, Uniformity of Use and Standards, Ease of Use, and Security."

Regarding dynamic data, it was underlined that "data that is frequently updated, often in real-time, public-sector bodies and public undertakings should make them available for re-use immediately after collection, through appropriate APIs, and, where appropriate, for bulk download, unless it would involve a disproportionate effort.

⁷Act of 25 February 2016 on the re-use of public sector information (Journal of Laws of 2016, item 352).

⁸API is a set of functions, procedures, definitions and protocols for machine-to-machine communication and smooth data exchange. APIs should be supported by clear and complete online technical documentation

The new directive specifically treats the following categories of data: dynamic data, high-value data and research data⁹. It was recognized that the indicated categories of data are of strategic importance for the development of the economy and innovation.

Directive 2019/1024 was implemented in Poland by the Act of 11 August 2021 on open data and re-use of public sector information¹⁰. The act has a title analogous to the directive whose provisions are implemented. It may suggest that the concepts of "open data" and "re-use of public sector information" are separate. It is pointed out that such an approach "is not covered by the content of the commented act. Open data is a type of public sector information, in electronic form, made available in a specific way, on the terms provided for in art. 2 point 11 and in art. 10 [act on open data and re-use]. Therefore, if, on the basis of the analyzed act, everyone has the right to re-use, then the concept of open data is related to the efforts of the obliged entities to make the data available as open, and to the support provided to them in this process. The open data is public sector information in electronic form and made available on specific terms¹¹.

Act on open data and re-use of public sector information - regulatory approach

The regulatory approach used in the provisions of the Open Data Act is based on two aspects. On the one hand, the act imposes obligations on the addressees of the regulation, including, among others, to make available on the data portal¹² public sector information of particular importance for the development of innovation in the country or the development of the information society, which, due to the method of storage and sharing, allow for their re-use¹³. Another obligation relates to the need to make data available in open formats and, where applicable, using APIs, which are limited¹⁴. Detailed regulations apply to dynamic data (Article 24(1) of the Act) or high-value data (Article 25(1)), imposing the obligation to make them available - in the case of dynamic data - 1) immediately after their collection; 2) via API; 3) if possible - for bulk download. High-value data, in accordance with the Act, should be made available: 1) free of charge; 2) in a machine-readable format; 3) via API; 4) if possible - for bulk download.

In this respect, the regulatory challenge is to define the data sharing standard in such a way that it will lead to the fulfillment of the essence of open data (i.e. non-requested access to information available in open IT systems and open formats). Another regulatory challenge is related to defining the relationship with other legal goods (from the right of access to public information, including the right to re-use public sector information). An obvious field for theoretical and practical problems is the relationship between data availability and the

⁹Recital 27 of Directive 2019/1024 indicates that "Research data includes statistical data, results of experiments, measurements, field observations, results of surveys, recordings of interviews and photographs. They also include metadata, specifications and other digital objects. Research data is different from scientific articles reporting and commenting on the findings of the scientific research that provided them."

¹⁰Act of August 11, 2021 on open data and re-use of public sector information (Journal of Laws of 2021, item 1641, as amended).

¹¹B. Fischer, A. Piskorz-Ryń, M. Sakowska-Baryła, J. Wyporska-Frankiewicz, *Ustawa o otwartych danych i ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warsaw 2022, LEX (el).

¹²dane.gov.pl

¹³Article 32 sec. 1 of the Act on open data and re-use of public sector information.

¹⁴Article 10 par. 2 and 3 of the Act on open data and re-use of public sector information.

protection of individuals' privacy¹⁵. The legislator - both EU and national - introduced a clear rule stating that the provisions of the Act on open data (and more broadly - on the re-use of public sector information) do not violate the provisions on the protection of personal data¹⁶. A similar rule was adopted in the case of contact with access to public information, recognizing that the open data and *reuse regulations* do not violate the right to access public information or the freedom to disseminate it, or the provisions of other acts specifying the principles, conditions and mode of access or re-use of information *being* public sector information¹⁷.

In addition, the Act regulates the provision of public sector information for reuse upon request. According to Art. 21 sec. 1 of the Act on open data and re-use, a request for access to data for re-use is submitted in cases where public sector information:

- 1) has not been made available in the Public Information Bulletin or in the central repository (i.e., in official information publishers),
- 2) has been made available in a manner other than specified in point 1 and no conditions for re-use or fees for re-use have been specified or the absence of such conditions or fees has not been reported.
- 3) will be used under conditions other than those specified for this information,
- 4) has been made available or transferred based on other acts specifying the rules and procedures for accessing information that is public sector information.

The Act specifies the procedure for dealing with a submitted application. Generally, the obligated entity should provide information for re-use. However, if it comes to the conclusion that due to legal restrictions (reasons for refusal) the information cannot be provided, then the authority should issue a decision refusing to disclose public information. It is an administrative act that the applicant may appeal to the administrative court (after appealing to the Minister of Digitization).

However, two issues should be noted. Firstly, an administrative act on refusal to disclose public sector information for reuse is issued only when, in the opinion of the authority, the request concerned the disclosure of public sector information. If the authority decides otherwise, then in the so-called informs in writing that this Act is not applicable. In this case, the applicant may lodge a complaint, but not against the decision (which has not been issued, since - according to the authority - the Act is not applied), but a complaint about the inaction of the obliged entity.

Is the Polish regulation of open data and reuse a *success story*?

The measure of the level of digitization of the European Union Member States is the DESI index (*Digital Economy and Society Index*), which has been used for nearly a decade at the EU level. This index gained importance because it is a reference point in accordance with the provisions of the decision of the European Parliament and of the Council, which established the

¹⁵M. Salamonowicz, *Otwarty dostęp do danych badawczych w ramach repozytorium instytucjonalnego a ochrona danych osobowych i prawa do prywatności*, „Gdańskie Studia Prawnicze” nr 2(54)/2022, pp. 145-155.

¹⁶Article 7 par. 2 of the Act on open data and re-use of public sector information, recital 71 of Directive 2019/1024.

¹⁷Article 7 par. 1 of the Act on open data and re-use of public sector information, recital 23 of Directive 2019/1024.

policy agenda "Second to the Digital Decade", setting the European Union and Member States digital goals¹⁸ for the coming years.

The results of the DESI index are published annually. In the general ranking of Member States, Poland has been occupying the last positions for years. It is worth noting that - in the latest reports - while many difficulties with the development of digitization are pointed out, it is appreciated that in the case of open data, Poland achieves a "very good result", above the ¹⁹EU average.

Recital 62 of Directive 2019/1024 declares that "The Commission shall support the development of an online Open Data Maturity Report *with relevant performance* indicators for the re-use of public sector information in all Member States." Current information is also published on the European Open Data Portal ²⁰. Early on, data openness research was by the OECD as part of the *OURdata indicator* ²¹.

In the latest Open Data Maturity Report 2022 ²², Poland was included among the European leaders and recognized as *a trendsetter*. The assessment under this indicator is multi-stage and consists of numerous indicators ²³divided into four dimensions: 1) open data policy, 2) impact (significance) of open data, 3) functioning of the open data portal, 4) quality of open data. The latest survey shows that Poland is highly rated in all four areas, scoring a total of 95% of the possible points.

¹⁸Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the 2030 policy program "Road towards the Digital Decade".

¹⁹ 2022 *Digital Economy and Society Index Poland*, p. 17 (access: <https://ec.europa.eu/newsroom/dae/redirection/document/88756>).

²⁰data.europa.eu

²¹see e.g. *OECD Open, Useful and Re-usable data (OURdata). Index: 2019*, Policy paper, <https://www.oecd.org/gov/digital-government/ourdata-index-policy-paper-2020.pdf>.

²²https://data.europa.eu/sites/default/files/data.europa.eu_landscaping_insight_report_n8_2022_1_1.pdf

²³Open Data Maturity Report 2022 – Methodology, https://data.europa.eu/sites/default/files/method-paper_insights-report_n7_2022_0.pdf.

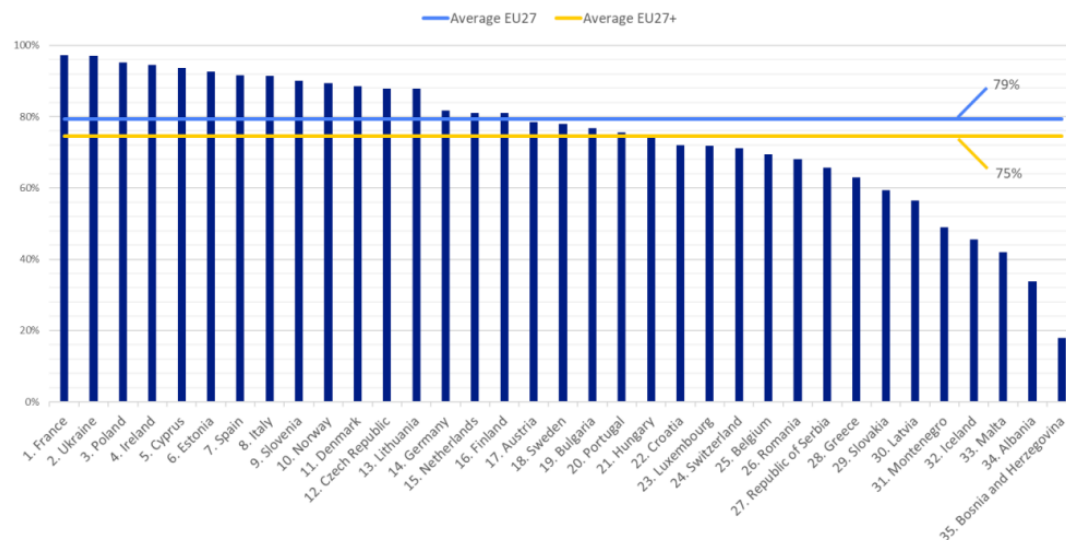


Figure 2: The overall Open Data Maturity scores of the 2022 assessment

Drawing 1. Open Data Maturity Report 2022.

In view of the above, re-use in the proactive mode, i.e., the practice of providing information by the administration actively, can be positively assessed in Poland. However, consideration should be given to whether the application mode of disclosure of public sector information sharing can be assessed as well.

Specifics of re-use on request

If public sector information is not proactively made available (e.g., in a database), governments are required to make public sector information available upon request.

In order to examine the practice of application reuse, secondary data was analyzed, i.e. the number of court cases received by administrative courts. In the Polish realities, there may be two types of cases based on reuse. First, the applicant may file a complaint for inaction. However, it should be emphasized that inaction includes not only the classic "silence" of the authority, but also, for example, the authority's (obliged entity) mistaken recognition that the subject of the application does not cover public sector information. Therefore, the Open Data and Reuse Act cannot be applied.

Secondly, the courts may receive complaints against decisions and other acts. These cases concern matters considered on the merits, i.e. refusals to provide public sector information for re-use, the issue of reuse conditions, or the conditions imposed.

The following is data on the number of cases, compiled based on statistical data published by the Supreme Administrative Court. The first two tables refer to re-use cases. The last two contain a list of all matters relating to the generally understood information law. The list was made to show the proportion of re-use cases, especially regarding national access to public information (which is not regulated by UE law).

Cases in the field of re-use of public sector information - complaints of inactivity

year	completed proceedings										
	sum	at a public hearing					closed sessions				
		sum	complaints upheld	complaints dismissed	complaints rejected (formal reasons)	in a different way	sum	including			
							complaints upheld	complaints dismissed	complaints rejected (formal reasons)		
2016	8	0	0	0	0	0	8	1	5	2	
2017	6	0	0	0	0	0	6		4	2	
2018	7	1	0	1	0	0	6	1	2	3	
2019	4	0	0	0	0	0	4	2	2	0	
2020	2	0	0	0	0	0	2	0	1	0	
2021	2	0	0	0	0	0	2	0	2	0	
2022	10	0	0	0	0	0	10	0	0	10	

Cases in the field of re-use of public sector information - complaints against decisions and other actions

year	completed proceedings										
	sum	at a public hearing					closed sessions				
		sum	complaints upheld	complaints dismissed	complaints rejected (formal reasons)	in a different way	sum	including			
							complaints upheld	complaints dismissed	complaints rejected (formal reasons)		
2016	3	0	0	0	0	0	3	0	0	3	
2017	19	18	15	2	1	0	1	1	0	0	
2018	3	2	2	0	0	0	1	0	0	1	
2019	1	1	1	0	0	0	0	0	0	0	
2020	0	0	0	0	0	0	0	0	0	0	
2021	2	2	2	0	0	0	0	0	0	0	
2022	1	0	0	0	0	0	1	0	1	0	

**Cases in the field of information law (in general)
- complaints against decisions and other actions in 2022 (divided into categories)**

case symbol	type of case	completed proceedings									
		sum	at a public hearing					closed session			
			sum	complaints upheld	complaints dismissed	complaints rejected (formal reasons)	in a different way	sum	including		
complaints upheld	complaints dismissed	complaints rejected (formal reasons)									
648	information law (in general)	707	218	115	96	4	3	489	127	144	205
6480	access to public information	706	218	115	96	4	3	488	127	143	205
6481	re- use	1	0	0	0	0	0	1	0	1	0

**Cases in the field of information law (in general)
- complaints of inactivity in 2022 (divided into categories)**

case symbol	type of case	completed proceedings									
		sum	at a public hearing					closed sessions			
			sum	complaints upheld	complaints dismissed	complaints rejected (formal reasons)	in a different way	sum	including		
complaints upheld	complaints dismissed	complaints rejected (formal reasons)									
648	information law (in general)	2843	4	1	3	0	0	2839	1041	614	1056
6480	access to public information	2833	4	1	3	0	0	2829	1041	614	1046
6481	re- use	10	0	0	0	0	0	10	0	0	10

The tables above show that re-use cases rarely go to court. However, this is a consequence of the fact that the re-use mode is not used very often by citizens. This, in turn, results from the fact that the domestic access mode is simpler, contains less grounds for a negative settlement of matters, and is also associated with a significant guarantee of free of charge. There is a glaring disproportion between re-use cases and the mode of re-use of public sector information, which are incidental.

Another possible reason is the very narrow treatment of the scope of re-use by administrative courts. This observation results from a qualitative analysis of judgments issued by Polish courts in re-use cases. Most of them concern precisely whether the authority correctly decided that a given piece of information does not constitute public sector information (and therefore whether the objective scope of the act regulating re-use has been met).

On the basis of EU law, re-use applies to "documents", i.e., any content regardless of the medium used (written on paper or in electronic form or recorded in a sound, visual or audiovisual form. The national regulation, which states that public sector information should be understood as any content or part thereof, regardless of the method of recording, in particular in paper, electronic, sound, visual or audiovisual form (Article 2(1) of the Act).

Although at the level of legal regulations the scope of re-use is defined very broadly, restrictive treatment occurs in court practice. In the jurisprudence of Polish administrative courts, it is assumed that the provisions on re-use apply only to such information that will have the status of public information. A different interpretation would lead to the conclusion that since every content or part of it held by the obligated entity is subject to re-use, regardless of whether it concerns public matters or not, the provisions of the Act on access to public information would lose their *raison rationale* (e.g. judgment of the Supreme Administrative Court of April 12, 2019, I OSK 1614/17, judgment of the Supreme Administrative Court of June 11, 2019, I OSK 1921/17).

Summary

Open data, as a special form of re-use of public sector information, was introduced in the European Union because of the progressing development of the importance of information for the functioning of economies and societies. In legal terms, a normative *novelty* was introduced by Directive 2019/1024 as a result of adopting a new concept of "open data" and imposing specific obligations on Member States with regard to this information. At the same time, it was recognized that public data of fundamental importance for the development of enterprises and innovation are dynamic data, research data, and high-value data.

Directive 2019/1024 was implemented in Poland under the Act on Open Data and Reuse of Public Sector Information. This directive did not introduce revolutionary changes in the procedure of reusing public sector information in relation to previous regulations (i.e. the Act on Access to Public Information and the Act on Reuse of Public Sector Information).

The whole set of legal instruments used to open public data brings the desired effect in Poland. While Poland ranks at the bottom of the EU ranking in terms of generally measured digital progress, it is at the forefront of *trendsetters when it comes to data opening* . Significantly, each of the four examined dimensions was assessed very highly in Poland, which gives grounds for expressing a thesis about the effectiveness of the regulatory approach adopted in Poland and its

correct practical application. This assessment concerns the active approach of the public administration to making information available for reuse .

However, the efficiency of re-use on request should be assessed differently. Polish practice shows that reuse on request plays a marginal role in relation to national access to public information. While the courts annually consider about three thousand cases regarding access to public information, there are more than a dozen reuse cases. This is due to several reasons. From a regulatory point of view, national access to public information is more attractive for applicants, due to simpler regulations and the possibility of more informal handling of the matter.

A significant barrier to the implementation of reuse in Poland is the determination of the scope of reuse in court practice. Although at the level of the legal text it seemed that reuse would open up the administration due to the fact that it concerns a very broad concept of "document", the practice went in a different direction. Contrary to the wording of legal regulations, it is assumed that reuse applies only to information that is "public information" in national access. This, in turn, means that reuse is not used in practice, since it does not cover a wider range of information. In this case, applicants prefer to choose national access, which is simpler, more informal and better known by both citizens and the authorities dealing with the case.