
CEEP POSITION PAPER

KEY MESSAGES FOR THE TRANSPOSITION PHASE ON THE RE-USE OF PUBLIC SECTOR INFORMATION DIRECTIVE (PSI DIRECTIVE)

CEEP followed the legislative procedures of the Re-use of Public Sector Information (PSI Directive) very closely over the past year. In March 2018, CEEP has published its first comments to the European Commission PSI Directive followed by our Key messages and Amendments where we have claimed our overall support to the objectives to set a European regulatory framework. CEEP has also organized an Breakfast Discussion event in January 2019 where shadow rapporteur Michal Boni (EPP,PL) and Communication Advisor from the Andrus Ansip Cabinet Maximilian Strotmann and Jiri Pilar, Policy Advisor at the European Commission have exchanged with our members some last remaining issues within this file.

Our key messages for stable European data framework are:

- **Creating a fair and level-playing field**
- **Avoid jeopardizing existing legislations**
- **Ensure a sustainable and high-quality public service**
- **Secure financial stability**

Overall, CEEP has welcomed the decision of the EU legislator on 24 January 2019 on their compromised text to remain the initial Commission's proposal to not contain any data on a general, automatic obligation to allow the re-use of documents produced by public undertakings. This means in particular the publication of certain types of documents which are excluded from access by virtue of the access regimes in the Member States, including the protection of national security, defense, or public security, statistical as well as commercial confidentiality (e.g. business, professional or company secrets).

We also have welcomed the decision of EU legislators to refrain from defining a list of High-Value datasets and instead have adopted the proposal of the Council on Article 13, where this specific list will be adopted by the means of implementing acts to allow for more scrutiny and transparency. This compromise allows for more transparency to promote cooperation and reflection, i.e. take into account an appropriate degree of burdens, especially for public authorities. In that regard, we take this opportunity to elaborate on our concerns when publishing certain sensitive data especially when publishing data from critical infrastructures to ensure security and efficiency is still guaranteed.

Nevertheless, at CEEP we see in some aspects uneven and unfair treatments to which public undertakings are in this compromised text potentially exposed to. **In general, we ask for the upcoming transposition phase to take the principle of reciprocity into account especially in regard to an equal**

level-playing field between public undertakings and private companies and marginal costs regulations whilst not creating any double legislations and guaranteeing measurements of security for critical infrastructures and sensitive data from fraud and physical attacks.

Digitalization is a path that all our public service's enterprises are open to invest in and further develop/integrate in their own business models. The premise stays that data is increasingly a valuable good in the economic sector. This means, that data-based products or trading of data will potentially provide additional income to public services' providers, which can be re-invested with the aim to accelerate their digitalization process. At the same time, public service providers are still at the beginning of such a transformation to systematically collect and analyse data to effectively use such data for their sectors. On that point, public services may risk at this early development stage their future business if this Directive is not clear on its definition and respects certain existing regulations that will potentially harm public service businesses.

CEEP therefore strongly pleads in this crucial development phase to take the voice of public authorities into account when Member States evaluate the PSI Directive to ensure a true European support tool for ongoing digitalization, innovation and investments by public services' enterprises and not entering a path to legal uncertainty and a reduction of investments, harming the long-term provision and development of public services.

A Level-Playing field needs to be guaranteed for all market players

At CEEP we regret to see the decision to keep the private companies out of the scope of this Directive. It is creating a substantially unequal treatment between public undertakings and private companies which operate in many cases such as in the water, energy, transport and postal service sector on the same market. **When providing data, documents and other services, a level-playing field that is fair to all market players is a necessity to guarantee a dynamic service able to reinvest and adapt to a competitive market.** As the companies which tend to benefit from open datasets are not small, local start-up businesses, but also large platforms that want to compete with European local, regional and national public services' enterprises, **it is thus essential to create a fair European data framework between all market actors, independently of their ownership.** This is now as it stands not guaranteed if only some enterprises have to share data with private ones who in turn could be enabled to take over business models of those enterprises which act in the general interest and, for instance, create local jobs and ensure stable investment in the underlying infrastructure.

At the same time, **we appreciate the decision to extend the safeguarding for public undertakings in the market added in Article 1 (2)(b), ensuring an exception of procurement rules when data held by public undertakings are related to activities that are directly exposed to competition as laid down in Article 34 of Directive 2014/25/EU.** Additionally, the Directive goes generally in the right direction to recognize that when the re-use of data and documents from public undertakings are taken, it should not lead to market distortions and should not undermine a fair competition.

However, it is not entirely clear how such a protection is evaluated and how it will take shape in practice. **In CEEP's view, the attempt to target a fair competitive market condition will still fail in this directive.** Even more, an imbalance would accrue as it obliges undertakings in public ownership to provide their data, regardless of whether they are in a competition with a private undertaking or not. This is incompatible with the principle of reciprocity and fair competition. **Private undertakings that are competing with public undertakings could use the public data, gained by public money to**

improve their services and generate financial profits. For example, a company like Uber has clear interest to gain dynamic data of vehicles to identify hotspots and implement appropriate offers for their customers.

Recognizing fair completion and ensuring transparency, public enterprises and public authorities have an interest in data sharing frameworks, based on the principle of reciprocity. Promoting competition and a stable communication between market participants, we suggest an implementation of frameworks with objectives to reduce barriers, empowering SMEs and public undertakings and facilitate innovation. The reciprocal model creates an incentive to generate and share data and documents with the aim to receive the same equivalent high quality data in return. In spite of acknowledging the competitive economic environment in this Directive allowing public undertakings and public sector bodies to be able to charge above marginal costs, the compromised text still creates legal uncertainty, hindering ongoing innovation and the incentive of the Directive.

As such, CEEP suggest to Member States to review Recital 15 and consider to go beyond the minimum requirements set in the PSI Directive to: Firstly, ensure proper safeguarding of public undertakings when exposed to competition and Secondly, apply the same rules of this Directive to private companies, especially those that provide services of general interest to guarantee reciprocity amongst market actors, as well as an implementation of the reciprocal model.

Avoiding any double legislation and harmonize existing regulations within the Directive

We welcome the adoption of the proposed change by the Council in the compromised text explaining that the Directive should not contain a general obligation that requires public undertakings to publish the re-use of data and to bring particular attention to the protection of critical infrastructures when allowing the re-use of data as defined in Directive 2008/114/EC and in the NIS Directive as cited in Recital 22. At the same time, **CEEP insists to handle the Directive in the transposition phase with care by carefully taking into account other existing regulations on open data.** We highly suggest to avoid any overregulation of existing regulations as **for example in the ITS Directive** and its delegated acts, which requires operations from all modes- public and private- to share travel information and service data with each other. In its Annex are very concrete data sets from the transport sector already defined, which should be made available within certain time periods in a certain format.

In CEEP's view, we ask to take the harmonization of different EU directives into account to avoid any double legislation, in particular in the transport sector

Supporting a stable framework for a sustainable and high-quality public service

At CEEP, we have welcomed the decision of EU legislators to refrain from defining a list of High-Value datasets and instead have adopted the proposal of the Council in Article 13, where this specific list will be adopted by the means of implementing acts to allow for more scrutiny and transparency. We also agree with the adopted 'hybrid solution' in the compromised text that allows the Commission to amend the Annex by adding **new thematic categories** by the means of delegated acts. **The list as it**

was agreed on is in general acceptable but needs further clarification if critical infrastructures are directly affected in category earth observation and environment and mobility. CEEP members are still concerned about the objectives, content and scope on the future High-Value datasets.

Any publication of documents and data that could jeopardize the security of critical infrastructures (sewer system, control rooms, energy production and technical plans and gas pipes) **should be avoided from being published.** Customers from the transport, energy and water sectors value a high standard of trust and protection within the public enterprises. This is not just about publishing some IT systems information, but also records about the physical nature of critical infrastructures (e.g. location and structures of canals, pumping stations, control rooms). **Public critical infrastructures must be guaranteed protection from physical threats due to high risks of terrorist attacks.**

In particular regard to the Recital 52 setting in place and define High-Value datasets, the compromised text shows for in the annex listed thematic categories Earth observation and Environment an illustrative example of *energy consumption*. **Giving out such sensitive data will harm directly local public enterprises' businesses and the security of their customers making them more vulnerable to attackers.** As an example, data protection in Smart Meters is one of the highest priorities for Distribution System Operators (DSOs). Publishing such data to any third parties, which show precisely the consumption of the customers to enhance energy efficient consumption, will violate the General Data Protection Regulation. **The free availability of individual energy profiles could lead to criminal activity** (e.g publishing knowledge about if someone is in the house/apartment by seeing their energy activity portfolio). Additionally, the publication from anonymized smart metering data would not bring any further benefits for a European wide data economy, as there are no profitable business models that can be derived from.

Furthermore, **High-Value Datasets should not include commercially sensitive data** to third parties such as ticket and fare structures as well as data that could undermine operators' commercial relationships with advertising partners.

When defining data for the High-Value Datasets in Article 13 under the implementing act, CEEP asks Member States to benefit from this unique opportunity to make well thought through decisions for the future of public services in Europe and carefully assess the impacts of publishing certain High-Value data and ensure to treat each sector, especially the critical infrastructures, separately with the relevant expert groups involved in the discussions

Creating financial stability

The compromised text remained with its demand to force public undertakings and public sector bodies to make High-Value datasets available for free or at least in exceptional cases of market distortions limited to marginal costs. **The consequences of this regulation will cause a drain of values away from public services' enterprises.** Despite creating a leeway in Recital 32 acknowledging the competitive economic environment allowing public undertakings and public sector bodies to be able to charge above marginal costs, this Directive still creates legal uncertainty and hindering ongoing innovation in public services' enterprises by making investments on own datasets unstable and risky. Therefore, it will be necessary that **Member States define clearly the context and scope of reasonable return on investment if costs are exceeded and hindering competition according to the individual environmental needs of their public service bodies to guarantee a sustainable and high-quality**

public service fostering the Commission's objectives of developing the European data economy in the future.

Moreover, the development of the provision of High-Value datasets has no significant difference in its cost expenditure to dynamic data. Especially municipalities would face a crucial financial strain on their budget. Apart from that, **a general annulment of fee obligation violates the prohibition of state Aid as laid down in Article 107 TFEU.** A secure and sustainable household budget can only exist if it can rely on cost compensation. Otherwise, the extra resulting financial costs will hinder future investments in new innovative technologies and business models needed for a functioning data economy. The purpose of fees is precisely to compensate benefit of the individual. The effort caused by the individual shall not be financed by taxes. **Against this background, the proposed changes violates the organizational powers of the Member States.** Public services' providers are enterprises that, just like other enterprises, must deliver their high-quality services in an economical, cost-efficient way. This includes cost recovery when making certain data available for free or at marginal costs to other companies who would not contribute sufficiently to the required investments.

As an Example: According to cost estimates by the Federal Office for Metrology and Surveying in Austria (BEV), additional investment costs of € 20 million would result from the changes made in the PSI Directive. In addition, € 1 million of annual operating costs would have to be included in the available funds. In the short term, the BEV even expects a loss of revenue of up to € 5 million per annum, resulting from the removal of the possibility of charging standard fees. Thus, with such losses it shows clearly that by no means a large profit can be taken from the collection of the additional operating fees. The revenue is only used to cover the expenses. Without equivalent cost compensation, there is no incentive for municipalities to collect new data before publishing it again.

Moreover, **the generation of machine readability**, which enables further automated processing of the data, **causes additional storage costs** and an **additional administration expenditure** because data need to be available repeatedly. It is therefore a logical consequence that exemptions for cost compensation are and remain unavoidable. The same applies for the measurement of the **protection for confidential data.** The Directive talks about the anonymization of personal data, which is a **substantially complex and costly expenditure for public services' enterprises** and could become a serious concern facing high penalties under existing General Data Protection Regulation.

Also, the final compromised text argues that within a cost-benefit analysis public sector bodies and public undertakings will receive particular consideration in case of potential market distortions. However, such **a cost-benefit analysis will end up with the conclusion that data/documents must be published free of charge**, as the Commission, and now the Parliament and Council have agreed on, assesses public undertakings' losses less highly than the benefits for private companies. Therefore, the mandatory cost-benefit analysis does not provide sufficient protection against distortion of competition with the EU single market. **CEEP asked here Member States to take a particular look and investigate how public services can be protected efficiently from such financial burdens that the Directive will most likely expose them to.**

At CEEP, we ask Member States to ensure during the transposition phase to guarantee that marginal cost will be covered and ensured to the extent that the transfer of the re-use of data do not cause any additional costs for public undertakings. Here, the principle of reciprocity has to be taken into account in regard to the charges of marginal costs, which emerges from data generation, preparation and provision.