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SHAPING SMARTER GRIDS FOR YOUR FUTURE

European Distribution System Operators

Trilogue Recommendations for the Public Sector Information Directive

January 2019

The Public Sector Information (PSI) Directive aims at facilitating the re-use of public sector information throughout the European Union by harmonising basic conditions and removing major barriers to re-use. Whereas the original PSI Directive applied to open data provision by public sector bodies only, the latest recast extends the scope of the Directive to public undertakings.

E.DSO believes that the provision of open data holds many benefits for society. Large-scale sharing and re-use of data can facilitate innovation and new services. It can also help policy makers to take evidence-based decisions and increase efficiency in public administration. Moreover, open data contributes to transparency, which is essential for DSOs in their role as public service providers. Therefore, E.DSO members are committed to an open data policy. We have outlined various benefits in more detail in our Open Data Policy Brief[1], but also shed light on possible trade-offs, specifically for operators of critical infrastructure / essential services.

Due to their legal tasks and obligations, DSOs hold a variety of data that can be broadly divided into three categories: meter data, grid data, and market data. Not all of these are suitable for public release. Firstly, it must be avoided under all circumstances that data is made publicly available which could help anyone to harm infrastructure or disturb services. This includes terrorist attacks on the physical infrastructure, hacks of IT systems and theft. Secondly, DSOs must protect the data of their customers. Before it could be made publicly available, any information must be anonymised or aggregated. Moreover, one should be careful to ensure that personal data is still protected, and individuals cannot be recognised when different datasets are combined (so called mixed data sets), including by third parties. Once data is made publicly available it cannot be withdrawn.

We therefore urge the co-legislators to recognise sector-specific considerations when assessing which data is suitable for public release and which is not. A horizontal approach to open data and application to public undertakings in general, as currently foreseen in the Public Sector Information Directive, is not the right approach. For these reasons and due to the critical nature of their activities, we believe that operators of critical infrastructure / essential services, in accordance with the NIS Directive, should be exempted from the scope of the PSI Directive.

Therefore, our **key messages** are:

> **1. Public undertakings, and specifically operators of critical infrastructure / essential services, should be exempted from the scope of the PSI Directive.**
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> **2. In any case, public undertakings must have the discretion to decide whether or not to authorise re-use of their documents. It must be clarified that the PSI Directive does not impose new obligations on *what* data to publish, but instead sets requirements on *how* to make this data available for re-use.**
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> **3. Protection of sensitive customer data is a key concern for DSOs and must be guaranteed.**
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> **4. Ensure the proper involvement of stakeholders in the definition of high value data sets and give DSOs flexibility in the provision of dynamic data.**
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> **5. Data providers must have the possibility to recover their costs.**

In anticipation of the inter-institutional negotiations (Trilogue), E.DSO would like to provide its views on the proposals put forward by the European Commission, Parliament and Council. Our comments are based on the original Commission proposal (25 April 2018), the Council's preparation document for the informal Trilogue (25 October 2018) and the Parliament's compromise amendments (5 December 2018):

[1] https://www.edsoforsmartgrids.eu/wp-content/uploads/EDSO-Open-Data-Policy-Brief_1812_final-1.pdf

1. Public undertakings, and specifically operators of critical infrastructure / essential services, should be exempted from the scope of the PSI Directive.

Commission	Council	Parliament	E.DSO position
• Includes public undertakings in the scope of the Directive • Commission text makes no explicit reference to operators of critical infrastructure / operators of essential services • Only mentions that documents are excluded from scope of Directive by virtue of Member State access regime, incl. on grounds of protection of national security, statistical and commercial confidentiality (Art.2(d)) • No clear definition of public undertakings in Art.2(3)	• Includes public undertakings in the scope of the Directive • Recital 22 states that 'particular attention should be given to the protection of critical infrastructure defined in accordance with Directive 2008/114/EC and of essential services defined in accordance with Directive (EU) 2016/1148' (NIS Directive) • However, no reference to critical infrastructure or essential services in any Article • Definition of public undertakings in clarified in Art.2(3)	• In addition to public undertakings, the Parliament extends the scope to documents held by private undertakings produced in the performance of a service of general economic interest (Art.1(1ba)) • Recital 19 includes a reference to the NIS Directive as well as Directive 2008/114/EC; the PSI Directive shall not apply to documents access to which is excluded on grounds of network and information system security and protection of critical infrastructure • A reference to the NIS Directive and resulting exemption is also included in Art.1(2b) • Art.1(2da) also clearly states an exemption for documents access to which is excluded or	• E.DSO believes that extending the scope of the Directive to private undertakings, as foreseen by the Parliament, is not the right approach • To ensure a level playing field, we recommend exempting both public and private undertakings from the scope of the Directive • E.DSO welcomes the valuable additions of the Parliament with regard to the exemption of operators of critical infrastructure from the scope of the PSI Directive • The Commission's original proposal that refers to 'protection of national security' does not create the level of legal certainty needed in this very sensitive area

		restricted on grounds of protection of sensitive critical infrastructure information in accordance with Directive 2008/114/EC • Definition of public undertakings in clarified in Art.2(3)	• Also the Council's reference to critical infrastructure in merely one Recital is not sufficient; this exemption must also be reflected in the corresponding Article • Both Council and Parliament clearly define public undertakings; the Commission's definition is incomplete

2. In any case, public undertakings must have the discretion to decide whether or not to authorise re-use of their documents. It must be clarified that the PSI Directive does not impose new obligations on *what* data to publish, but instead sets requirements on *how* to make this data available for re-use.

Commission	Council	Parliament	E.DSO position
• States in Recital 22 that the PSI Directive does not contain an obligation to allow re-use of documents produced by public undertakings but that the decision whether or not to allow re-use is at the discretion of the public undertaking concerned	• States in Recital 22 that the PSI Directive does not contain a general obligation to allow re-use of documents produced by public undertakings but that the decision whether or not to allow re-use is at the discretion of the public undertaking concerned, except where	• States in Recital 22 that the PSI Directive does not contain an obligation to allow re-use of documents produced by public undertakings but that the decision whether or not to allow re-use is at the discretion of the public undertaking concerned	• The Articles must clearly state that public undertakings decide whether or not to authorise re-use of their documents. We therefore agree that obligations for public undertakings apply only after a decision by the public undertaking concerned to make data available

• However, there is no explicit mentioning in any Article	otherwise required by the Directive, Union or national law • However, there is no explicit mentioning in any Article	• This is also clearly stated in Art.3(2): '[…] where the re-use of such documents is allowed by the public undertaking […] which produced them […]' • Furthermore, Art.4(1a) states that 'the decision whether or not to authorise re-use of any or all documents under this Directive shall remain with the public undertaking […] concerned. After the undertaking has chosen to make a document available for re-use, it shall observe the relevant obligations laid down in Chapters III and IV […]'	• While the original Commission proposal states this is Recital 22 it fails to include a corresponding reference in any Article • E.DSO therefore strongly favours the clarification of the Parliament in Art.3(2) and Art.4(1a) that create more legal certainty • The Council's proposal is misleading insofar as it suggests that the Directive imposes new obligations on *what* data to publish rather than *how* to provide data for re-use; this is not the rationale of this Directive and must be clarified

3. Protection of sensitive customer data is a key concern for DSOs and must be guaranteed.

Commission	Council	Parliament	E.DSO position
• Includes a reference to GDPR in Recital 47	• Includes a reference to GDPR in Recital 47 and adds Art.1(3a) which clearly states that the PSI	• Includes a reference to GDPR in Recital 47 but goes beyond that, describing in detail in Recital 47a that data subjects should not be identifiable, even	• Protection of customer data is a key concern for DSOs. Therefore, E.DSO welcomes the additions of Council and

	Directive is without prejudice to GDPR provisions	in combination with associated data (mixed data sets) • Adds Art.1(3a) which clearly states that the PSI Directive is without prejudice to GDPR provisions; Art.5(5a) refers to compliance with the Union data protection legislation • Organisations subject to the PSI Directive must perform data protection impact assessments before taking decisions on scope and conditions for the re-use of documents (Art.3(2b)	particularly Parliament regarding the GDPR • More specifically, we appreciate the addition in Recital 47a as it is important that personal data is protected and individuals cannot be recognised when different datasets are combined (mixed data sets)

4. Ensure the proper involvement of stakeholders in the definition of high value data sets and give DSOs flexibility in the provision of dynamic data.

Commission	Council	Parliament	E.DSO position
• List of high value data sets adopted by the Commission by means of delegated acts (Art.13(6)) • Commission to conduct impact assessment including CBA prior	• List of high value data sets adopted by the Commission by means of implementing acts (Art.13(1)) • Commission to carry out appropriate consultations, including at expert level, to conduct an impact assessment	• List of categories and high value data sets set out in Annex II a; Commission can adopt delegated acts to supplement that list (Art.13(6)) • Commission to conduct impact assessment including CBA prior	• Supplementing the list of high value data sets through delegated acts does neither ensure the necessary involvement of Member States nor ensure that experts from the respective industries, organisations and associations

to adoption of delegated act (Art.13(7)) • Public sector bodies and public undertakings shall make dynamic data available for re-use immediately after collection, via suitable Application Programming Interfaces (APIs) (Art.5(4)) • Where immediate release of the data would exceed financial and technical capacities of public sector bodies or public undertakings, documents should be made available in a timeframe that does not unduly impair the exploitation of their economic potential (Art.5(5))	including a cost-benefit analysis, and to ensure complementarity with existing legal acts (Art.13(2)) • Public sector bodies and public undertakings shall make dynamic data available for re-use immediately after collection, via suitable Application Programming Interfaces (APIs) and as bulk download where relevant (Art.5) • Where immediate release of the data would exceed financial and technical capacities of public sector bodies or public undertakings, documents should be made available in a timeframe that does not unduly impair the exploitation of their economic potential (Art.5)	to adoption of delegated act (Art.13(7)) • Public consultations are held with all interested parties that are given the possibility to submit suggestions to the Commission for additional categories of high-value datasets or concrete datasets (Art.13(7a)) • Public sector bodies and public undertakings shall make dynamic data available for re-use immediately after collection, via suitable Application Programming Interfaces (APIs) (Art.5(4)) • Where immediate release of the data, without delay, would exceed financial and technical capacities of public sector bodies or public undertakings, documents should be made available in a timeframe that does not unduly impair the exploitation of their economic potential (Art.5(5))	will be heard during the Commission's impact assessment. E.DSO therefore supports implementing acts, as foreseen by the Council, as the appropriate procedure • We do appreciate, however, the valuable additions of Council and Parliament regarding public consultations with relevant stakeholders; nevertheless, we believe that implementing acts are more effective in ensuring the inclusion of relevant stakeholders' views through and exchange with their respective Members States' authorities • While it is good that Art.5(5), as foreseen by all three institutions, implies that in certain cases dynamic data can be released with some delay, it would be better to clearly specify that 'immediately after collection', as mentioned in Art.5(4), always takes into account the time needed to anonymise data; this is paramount for DSOs that

			collect personal data (e.g. customer data through smart meters) • Also for non-personal dynamic data collected by DSOs (e.g. MV grid parameters, MV/LV substation energy flows), processing time and the related costs should be taken into account

5. Data providers must have the possibility to recover their costs.

Commission	Council	Parliament	E.DSO position
• Art.6(3) states that '[t]he total income from supplying and allowing re-use of documents over the appropriate accounting period shall not exceed the cost of collection, production, reproduction and dissemination, and – where applicable – anonymisation of personal data and measures taken to protect commercially confidential information, together with a reasonable return on investment'	• In principle in line with the Commission's original proposal • However, re-use of specific types of high value data sets can be charged if making those datasets available for free would lead to a considerable distortion of competition; these specific types of data sets need to be defined in Commission implementing acts (Art.6(5a) and Art.13(2a))	• In principle in line with the Commission's original proposal; cost of data storage is also taken into account • Recital 47 states that '[a]nonymisation is fundamental to ensuring the re-use of public sector information within the rules and obligations to protect personal data under data protection legislation, even if it comes at a cost'	• It must be ensured that data providers can recover all costs which, in the case of DSOs, can be done through tariffs • This does not limit options to fulfil data requests that are costly, address specific sub-sets or are tailored to specific users; however, this must be considered a data service and not open data – thus falling entirely outside the scope of this Directive

• Re-use of high value data sets is free of charge for the user (Art.6(5)), except for public undertakings if an impact assessment demonstrates that this would lead to a considerable distortion of competition (Art.13(3))		• Re-use of high value data sets is free of charge for the user (Art.6(5)), except for public undertakings if an impact assessment demonstrates that this would lead to a considerable distortion of competition (Art.13(3))	• All aspects related to open data provision, incl. anonymisation or aggregation, must be financially compensated • While we welcome the proposals that provision of certain high value data sets can be charged, we believe that mere competition reasons are not sufficient; also in regulated environments, the provision of high value data sets must be appropriately compensated

EDSO for Smart Grids is a European association gathering leading electricity distribution system operators (DSOs) **shaping smart grids for your future.**

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