

Position Paper

Brussels 3 September 2018

CER position on the Directive on re-use of public sector information (recast)

Summary of key findings

This document sets out CERs position as regards the legislative proposal for the review of the PSI Directive. Below is a summary of the potential effect this proposal would have on some companies in the railway sector (many of which would fall under the definition of "public undertakings") and how the law would be put into practice in our sector.

CER has a positive view on re-using data and supports the distribution of public data by open data, especially in the form of open service, based on voluntary contracts with terms and conditions. Open service ensures that partners, external developers and service providers can enrich customer-oriented offers.

However, it is also crucial that those in possession of data can determine the conditions of re-use of their data when shared with third parties and are free to decide on the best technical way to make their data available in a dialogue with data users, e.g. through access to raw data or processed data and whether the access will be to static or real-time data, and to recover at minimum, the costs associated with the same.

Competitive and legislative impact

Transport companies receive relatively little in direct financing as a percentage of their funding for PSO services¹, yet this **proposal does not recognize that public and private transport companies compete for the same service contracts**. A distinction between "private" and "public" companies in their handling of their data would distort competition. The distinction should be based on the question whether the service is carried out on the basis of a public service contract or not.

Furthermore, the approach taken in the proposal risks preventing transport companies from making best use of their own data, as transport companies currently are building win-win partnerships within the sector and with third parties (such as start-ups, app developers and technology providers) developing new, personalised and flexible solutions for customers. The proposal as written could allow competing transport and other sector companies to utilize this data at no cost, preventing rail companies benefitting from their own data, and closing potential avenues of new revenue, especially for transport companies who provide complementary forms of transport.

It shall also be noted that this recast duplicates certain parts of the ITS Directive - Delegated Act (EU) 2017/1926 on multimodal travel information systems creating a possible contradicting requirements between the two texts. **CER strongly recommends keeping the transport sector out of the scope of the recast of the PSI Directive and, instead, continue regulating it by means of sectorial legislation**

Background

On the 25th of April 2018, the European Commission released its recast of the Directive on the re-use of Public Sector Information (PSI). This proposal substantially amends Directive 2003/98/EC and adds a number of new provisions². The present Commission proposal (COM (2018) 234 final) contains the following major changes for the transport sector:

¹ Or nothing at all in the context of open access operators

² The Directive was originally adopted in 2003 and amended in July 2013 by Directive 2013/37/EU

- Extension of the scope, to include documents from public undertakings applying Directive 2014/25/EU on the award of contracts³ as well as documents from public undertakings providing public transport services⁴.
- Dynamic data (real-time data) must be made available directly after their extraction via APIs (otherwise within a short-term period) (Article 5)⁵.
- Commitment to free re-use of high value data sets: this obligation applies to both public authorities and public undertakings (Article 13)⁶.
- Costs that may be taken into account for the calculation of the fees⁷.
- In addition to the mere costs of providing data, public undertakings can also quote an "adequate return on investment", which, however, is capped by definition (Article 2) (Article 6).
- Exclusive rights (i.e. sharing of data with selected partners) remain prohibited except where necessary for the provision of a public service, and then only under certain conditions (Article 12).

CER position

Competition and Investments

The railway sector is making digitalization a reality. This transformation requires high investments, and costs are not covered by public service contracts but by the companies themselves. Every actor (including public companies) should keep the ownership of the data created in their companies and be able to use them for business in the future. Opening data to both direct (other transport companies) and indirect (search engines, etc.) competition without compensating the company that generates the data. Sensitive data could flow from **public companies** to (possibly off-sector) **private companies**, who are not obliged to share data. A **balanced consideration of interests** and compatibility with transport policy objectives should be taken into account.

Moreover, the data generated by transport companies is not primarily paid by the public sector, since public subsidies are limited⁸. Costs are covered by the income earned through fares, own funds and compensation from student and social tickets. Against this background, it cannot be argued that the general public is the owner of the data collected in transport companies - rather, **the data belongs to the company who produces it**.

This proposal does not recognize that **public and private transport companies compete for the same service contracts**. A distinction between "private" and "public" companies in their handling of their data will distort competition. Neutrality regarding the ownership of companies also means that the European basic principles apply to both public and private companies, without any discrimination. The distinction should be based on the question whether a company carries out a public service contract or not. Since the proposal in Article 1 (2) (b), provides that data produced outside the public service contract should not fall within its scope the rest of the text should be reformulated according to this principle.

³ By entities operating in the water, energy and transport sectors. A "public company" is defined as a company over which the public authorities have a direct or indirect dominant influence (Art. 2)

⁴ within the framework EU Regulation 1370/2007 (Article 1.1)

⁵ Dynamic data must only be made available if it has already been shared once

⁶ The Commission should, by means of delegated acts, draw up a list of high-quality datasets, which must in principle be made available free of charge, in machine-readable format, by API and in the form of an open standard. The free-flow principle of public enterprises can be deviated only if an impact assessment concludes that this would lead to a significant distortion of competition in the markets.

⁷ Future costs for the anonymisation of personal data and costs for measures to protect the confidentiality of business information may also be taken into account (Art. 6).

⁸ or non-existent in the case of open access operators

MMTIS "Multi-modal Travel Information System"

Furthermore, in May 2017, the ITS Directive - Delegated Act (EU) 2017/1926 on multimodal travel information systems was presented. It aims to gather travel information and booking data in central national data hubs in order to facilitate access to it. This regulation already represents a compromise the sector is working on as regards data provisioning and data reuse. Currently, Member States are working on transposition into national law. The recast of the PSI Directive could result in different requirements leading to legal uncertainty, and **does not comply with the principle of better regulation** if the same issue is regulated in a second piece of EU legislation and, to some extent, in a different way.

In fact while the Delegated Regulation (EU) 2017/1926 contains an obligation to provide static data and leaves the decision on dynamic data to the Member States, the PSI Directive provides that, in principle, there is no obligation to publish them. However, the new Article 13 provides - especially for particularly valuable data - that they must be published. Moreover, there are other differences between the two texts: the MMTIS Delegated Act also includes private undertakings; and it leaves the actors the freedom to choose licenses. **CER strongly recommends keeping the transport sector out of the scope of the recast of the PSI Directive and, instead, continue regulating it by means of sectorial legislation.**

High-value data sets

The new Article 13, which includes an obligation to open up provision of "particularly valuable data" in addition to the previous directive, leads to considerable legal uncertainty. Not only does the Commission proposal remain completely open about which data could potentially address; in addition, the Commission is given wide-ranging powers to define these data sets by means of a delegated act - and this in an area (data disclosure obligation), which will have a particular impact on the various sectors, including the transport sector. It is urgent **to decide** the list of "high-quality data sets" by implementing act instead of delegated act and to limit the legal text to **what datasets are covered**.⁹ This should be clearly written down in Article 13 to provide more legal certainty for the various industries concerned.

Article 12 (4) obliges public undertakings to make "legal or practical arrangements" publicly available; this also includes complete contracts between partners, which are usually kept secret. It is important to pay attention to the protection of trade secrets. **Contracts and agreements** should not be considered "public data" and **should remain subject to confidentiality**. The requirements set out in Art.12 (4) are also unnecessary as public bodies and companies already have to comply with competition law, which prohibits the granting of an advantage in favor of a single partner. Furthermore, the **two-month time limit** sets from the date of publication of the contracts or agreements until their implementation, constitutes a **disproportionate burden** on businesses and public authorities. They would be forced to delay the implementation of their cooperation project by two months. For the reasons stated above, **we are in favor of deleting Article 12 (4)**.

About CER

The Community of European Railway and Infrastructure Companies (CER) brings together more than 70 railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. The

⁹ As the PSI guideline applies across sectors, we recommend a reference to the G8 "Open Data Charter" which contains a list of particularly valuable data ("high value data sets") in its annex (<https://www.gov.uk/government/publications/open-data-charter/g8-open-data-charter-and-technical-annex>).

membership is made up of long-established bodies, new entrants and both private and public enterprises, representing 73% of the rail network length, 77% of the rail freight business and about 93% of rail passenger operations in EU, EFTA and EU accession countries. CER represents the interests of its members towards EU policymakers and transport stakeholders, advocating rail as the backbone of a competitive and sustainable transport system in Europe. For more information, visit www.cer.be or follow us on Twitter @CER_railways.

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