Comments on the review of the PSI Directive – Public consultation

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E3PO represents at EU level the private operators of public infrastructures and services, EU wide or in some MS, in the following sectors: highways and access to roads, car parks, drinking water and sanitation, catering, public transport of passengers (rail, road), waste treatment, energy efficiency services, district heating networks.

In the sectors covered by E3PO’s members, the annual creation of value, by several thousands of companies, is considerable: over 200 billion € turnover and over 1,600 million jobs. These activities are very different, with a high diversity as regards the level of investments, the number of users that benefit from these services, the market share, and the economic and technical conditions. The services offered by companies represented in our membership are provided within a legal or contractual frame of public-private partnerships.

On 19 September 2017, the European Commission launched a public consultation on the review of the Directive 2003/98/EC on the reuse of public sector information (PSI Directive) in line with its strategy to foster the European data economy. Beyond the sole access and reuse of public data, the European Commission is preparing with this public consultation a possible initiative on accessibility and reuse of operators’ data created while providing services of general economic interest (SGEI), and on accessibility and reuse of privately-held data which are of public interest.

Private operators of SGEI are already part of the digitalisation of the European economy. Private operators of public services are used to carrying out collection, creation and transmission of a wide range of data, either for business purposes (such as developing new ways to improve the quality of service, and B2B agreements), or under numerous legal obligations for transparency purposes and public authorities’ use with due respect of personal data protection rules. Their unique position makes them the prime actors and witnesses of the development of the European data economy, of its advantages and its limits.

Thus, E3PO follows with interest this project and would like to take the opportunity of the reflection undertaken by the European Commission to submit comments and suggestions.
A clear definition of the required data

In the absence of definition of the scope of possible new data access obligations, the ongoing public consultation widely considers “data”, with the perspective of opening their access to the public, the latter being also widely understood. This broad approach makes difficult a precise response on the feasibility or the risks of such perspective: how to grasp the practical, legal, and economic consequences if the notion of “data” can cover all information of any kind under any format, produced by the targeted companies? Does it cover, for instance, internal accountancy information, all details of purchases and sales by a given company, technical information of equipment use, exchanges with public authorities, with users/consumers, staff profiles, would every information have to be digitalised?

Any project deriving from this consultation should be based on a clear definition, referring to practical examples. The following elements could be taken into account:

- Private operators of Services of General Economic Interest (SGEI) already forward consolidated operational data to their public co-contractor and public authorities, on the basis of legal or contractual obligations of reporting. As a general principle, E3PO members think that a wider access and reuse of these information should only cover data strictly related to the provision of the service. In particular, it should not include data related to operators’ know-how which imply substantial private investments and need protection as an own asset of the company (e.g.: databases, source codes, websites, commercial platforms, client registers…).

- The right to access and reuse privately-held data which are of public interest should be linked to a clear definition of the notion of “public interest”. It could possibly be based on a sectoral approach and in any case, should be related to the goals such a “public interest” is deemed to fulfil, in order to prevent abuses and undue benefit from others’ economic efforts. To this end, the respect of existing legal protections such as trade secrets and intellectual property rights should be also reaffirmed in the new provisions of the reviewed Directive.

- While providing public services, private operators of SGEI carry out these services in various sectors with different types of contracts and according to various financing models, including more or less public subsidies. Private operators of public services bear the economic “operating risk” when exploiting concession services1 and, in any case, bear the risk of their own investments in a competitive environment. Thus, a Service of General Economic Interest is not necessarily “predominantly” publicly-financed. The inherent features of concession/PPP contracts and their diverse financing models oppose the idea that all data should be made publicly and freely available because there is some degree of public financing. It would lead other economic actors worldwide (such as e-platforms, apps developers, new mobility players… etc) to benefit from such free resource at the expense of European SGEI operators.

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1 The transfer of an operating risk to the operator is an essential defining element of concessions under Article 5, 1b of Directive 2014/23/EU on the award of concession contracts.
The need to prevent misuses of data

E3PO would like to underline that even with full respect of legal protections of confidential data such as trade secrets and intellectual property right, a massive disclosure of data could be exploited in various ways with detrimental effects. Moreover, it should be kept in mind that once released a data cannot be taken back, meaning that an uncontrolled opening of these data would have irreversible effects. While E3PO welcomes the goal to develop the European data economy, it suggests that the possibilities mentioned below should be taken into account in the review of the PSI Directive:

- Competitors could exploit data seemingly innocuous by themselves, and thus not likely to be covered by trade secrets and intellectual property rights, to unveil other companies’ know-how (e.g.: commercial practices, tools and marketing approaches to find new clients, to develop the service network...etc) through datamining and cross-referencing of numerous data.

- The quality of services and users’ safety could be at stake in case of misused data by third parties without control by the operator of the service or public authorities to ensure its reliability. For instance, an app showing contradictory information on motorway traffic is likely to cause traffic congestions and accidents.

- In the context of terrorism, some public service operator’s data that are harmless in appearance constitutes sensitive information that could be used for criminal purposes (e.g.: access to water networks, classified installations/waste treatment facilities, aeration systems in transport infrastructure...etc).

As a conclusion, there is a need to define what are sensitive data, and the modalities under which they would be exempted from public access. Besides data already defined as confidential, covered by trade secrets or intellectual property rights which should remain for the exclusive use of the operator, the public authority could act as a filter for the remaining data in order to decide whether or not to provide further access to the public. However, this solution would not be flawless as in some sectors, operators have pointed out cases of disclosure of sensitive information by their public co-contractor.

The extra-cost of data

The imposed collection, transformation and transmission of data in a defined format would constitute an additional cost. Given that such obligation is likely to be differently applied from one EU Member State to another one (see next section), it could also have an undue impact on competition should this extra-cost be mainly borne by private operators. As far as some data have an economic value, and not a “public interest” one, they should be available under contractual conditions. In the context of development of the data economy, it should be noted that in countries where there are already open data laws, the use of public service operators’ data by other companies is already a source of additional investments by the operators. For instance, public transit apps companies using real-time public service data significantly increase the number of requests to public transport operators’ servers, leading to necessary upgrades of these servers at the expense of the operator.
Asymmetrical situations in the application of the new obligations

Given the goal of the European Commission to foster the European data economy, E3PO would like to underline that a proper balance has to be found between a wider opening of operators’ data which would benefit stakeholders as a whole and resulting distortions of competition which could affect operators of SGEI:

- Services of General Economic Interest are not defined by EU treaties, and Member States’ authorities are given great latitude to classify or not a service as SGEI. Thus, an obligation to make SGEI operators’ data available for access and reuse will inherently have a different scope across the European Union, with an asymmetric application between private operators providing the same service in different Member States. This difference in the scope of these obligations between EU countries is likely to lead to distortions of competition with some of the previously mentioned detrimental effects being accentuated (datamining by competitors to unveil know-how, extra-costs...) by uneven application of such obligations.

- While the opening of SGEI operators’ data will allow other companies which are not SGEI operators to improve their services or even create new ones, SGEI operators have no right to access back these data once improved in order to use them themselves to improve or create their own services (e.g.: traffic data from the motorway sector used by an online ridesharing company could not be accessed back by the motorway operator). In order to foster mutually beneficial situations, E3PO suggests that accessing back transferred data once improved (possibly under conditions) should be a possibility among the conditions that operators could impose for reuse of their data.

Private operators of SGEI perform in a competitive environment: competition between management modes (competitive process or direct award), competition between operators answering a call for tenders, and now competition with new actors of the digital economy which are not SGEI operators. In this context, it is crucial to ensure the protection of SGEI operators’ investments and a level-playing field for all economic actors. For instance, a company developing apps for car transportation is a possible competitor for a public transport operator. The unilateral possibility for this company to access an operator’s data without control by the latter may lead to distortions of competition and unfair practices: this app company is likely to use operators’ real-time data to indicate metro slowdowns to attract customers, but it is unlikely to change the communicated information once the situation is back to normal, thus misleading public transport users by omission for its own interest and against the interest of the public service.

- According to the ongoing public consultation, an obligation on accessibility and reuse of data produced by SGEI operators would be applied to both public and private operators. However, equal access to produced data does not necessarily mean access to the same type of data and quantity of data. As mentioned before, private operators of public services already widely produce data for internal purposes (notably to improve the performance of the service provided or to create new services) or under legal obligations for transmission to public authorities. Since public in-house services do not necessarily produce the same types and quantity of data for internal purposes and are not subject to the same legal obligations, this
could lead *de facto* to an *asymmetrical situation between private and public operators of SGEI*.

This likely asymmetry of data between public and private operators also raises questions on the feasibility of benchmarking of public and private data mentioned in the public consultation as a possible incentive to share private data since there is no certainty that public and private operators’ data will be comparable for the aforementioned reasons. The same logic applies to an obligation on accessibility of privately-held data which are of public interest which is by definition only applicable to private entities’ data without new publicly-held data available for comparison.