[Translation]

Berlin, 31 August 2018

AöW position
on the European Commission proposal on the re-use of public sector information (recast) - 2018/0111 (COD)
[PSI Directive Proposal]

[EU registration number: 00481013843-28]

Hereby the Allianz der öffentlichen Wasserwirtschaft e.V. (AöW) as representation of interests of the public water management in Germany comments the above-mentioned proposal for a Directive of the European Commission.

The proposed PSI Directive extends the scope of application to documents held by public undertakings active in the areas defined in the Utilities Directive (Article 1(1)(b) PSI Directive Proposal): this also affects public undertakings in the water management sector.

Our demands:

- ***The AöW calls for to exempt explicitly public undertakings in the water management sector from the scope of application of the PSI Directive.***

- ***The AöW demands an exception from Article 1(5) PSI Directive for activities in the public water management.***

- ***The AöW demands for Article 5 PSI Directive that a public authority may require from private companies "to permit the production, re-use and storage of a certain type of documents by a public sector organisation or a public authority and in particular to give it out in the case of re-municipalisation."***

- ***The AöW calls for an exception to Article 6 of the PSI Directive Proposal for activities in the public water management.***

- ***The AöW strictly rejects the planned extension of the European Commission's competence to introduce delegated acts under Article 13 of the PSI Directive Proposal. In particular, this severely restricts the examination of the principles of subsidiarity and proportionality as well as the legislative powers of the EU Member States and undermines the Treaty on European Union.***

Allianz der öffentlichen Wasserwirtschaft e.V.
VR 26527 B • Amtsgericht Charlottenburg

Präsident:
Prof. Dr.-Ing. Lothar Scheuer

Vizepräsident:
Hans-Hermann Baas

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Christa Hecht

The proposed PSI Directive weakens public undertakings, including those in the water management sector

In the draft of the PSI Directive we see a weakening of public undertakings, while private companies remain unaffected and are even strengthened. The EU Commission is not even behaving neutrally, but biased in favour of profit-oriented private interests. However, a safe, good and affordable drinking water supply and waste water disposal by public undertakings requires in the public interest favourable conditions for public welfare-oriented undertakings.

After all, the PSI Directive Proposal contains important exceptions for public undertakings that are providing a service of general economic interest and that therefore also apply to public water management. In such a manner, the obligations under the PSI Directive should only apply insofar as the public undertaking in question has taken the decision to make certain documents available for re-use (Article 3(2) PSI Directive Proposal). Furthermore, the procedural obligations regarding a request process within specific time-limits do not apply to them (Article 4(5)(a) PSI Directive Proposal). Finally, exemptions should apply to obligations for making documents available through certain technical means if they are too burdensome on the undertakings (Article 5(5) PSI Directive Proposal).

Despite these exceptions, in our view the extension of the scope of application to public undertakings in the water management sector is not appropriate for the following reasons:

The PSI Directive Proposal can be used in conjunction with the Drinking Water Directive Proposal to promote privatisation and liberalisation (p. 3 of the explanatory statement to the PSI Directive Proposal)

With a horizontal legislation for public undertakings which are active in the areas defined in the Utilities Directive the proposed Directive goes beyond the information requirements of the EU Drinking Water Directive. This does not only concern the existing EU Drinking Water Directive (Article 13 Drinking Water Directive 98/83/EC), which allows Member States to take the necessary measures to ensure that consumers have appropriate and up-to-date information on the quality of water for human consumption. The planned legislation also goes beyond the planned recast of the Drinking Water Directive (Article 14 and Annex IV of the Drinking Water Directive Proposal, COM(2017) 753 final).

Regarding the proposed new provisions of the two Directives, we now have to note that although the rules are sector-specific and related to selected data sets, the PSI Directive Proposal "lays down a horizontal framework providing minimum harmonisation of re-use conditions across domains and sectors" (p. 3 of the explanatory memorandum to the PSI Directive Proposal). We had already criticised regarding the Drinking Water Directive Proposal that many of the information and transparency obligations mentioned in Article 14 and Annex IV of the Drinking Water Directive Proposal have rarely relation to the quality of drinking water. In connection with the PSI Directive Proposal, our impression is now strengthened that the information obtained from the application of the two Directives is being used rather to make a uniform but, in our view, inadmissible EU-wide comparison in order to find and promote "submarkets" and "potentials" for privatisation and liberalisation.

The scope of application concerns only public undertakings (Article 1(1)(b) PSI Directive Proposal)

The proposed extension of the scope of application to undertakings operating in the Utilities Directive explicitly concerns only to "public undertakings" (Article 1(1)(b) of the PSI Directive Proposal). This differentiation starts with the ownership structure (see Article 2, no. 3 PSI Directive Proposal) and contradicts Article 345 TFEU, according to which the governing system of property ownership in the various Member States "shall in no way prejudice". The planned regulation disadvantages public undertakings compared with private companies! It leverages out the TFEU. There is no legal legitimation for this at EU level and the EU Member States must not agree to it under any circumstances!

No differentiation according to financing of the public undertaking

The proposal for a Directive makes no differentiation by the rules for the transfer of data between the financing of the public undertaking's activities. In the area of public water management, the public task is financed by the users to cover costs and not by the general budget. In our view, it is therefore incomprehensible that the public undertaking should not have the complete and unrestricted right to use and exploit data in the interests of its users, whereas this is possible for a private company – even alone for its own profit maximisation interests. This strengthens the position of a private company while massively weakening that of a public undertaking. With this proposal, the EU Commission is exceeding its neutrality. This is a non-contractual behaviour.

The exclusion of the "sui generis protection right" must benefit public undertakings sufficiently (Article 1(5) of the PSI Directive Proposal)

While private companies can invoke the so-called "sui generis protection right", this should not be possible for "public sector bodies" (Article 1(5) PSI Directive Proposal in conjunction with Article 7(1) Database Directive 96/9/EC), whereby in the water industry in Germany the "public sector bodies" may be identical to the "public undertaking". As a result, the datasets generated on the basis of a public task are "commercialised" for other purposes (including in the definition "re-use" in Article 2, no. 9 PSI Directive Proposal). It cannot even be guaranteed that this will benefit the public sector body or public undertakings sufficiently. This restriction does not apply to private companies.

Fair opportunities for re-municipalisation must be established. The obligations of the PSI Directive are to be limited to private companies! (Article 5 PSI Directive Proposal)

Re-municipalisation in the field of water management is often made more difficult by the fact that the information required for the continuation of operations is not voluntarily provided by private operators, while in the case of privatisation all documents are regularly handed over to the private company. The experience of recent years has shown that in the case of re-municipalisation long-term disputes have arisen over the documents to be given out and the assessment of value of the water infrastructure facilities, which considerably delays the implementation of re-municipalisation.

An obligation to private companies to give out the documents would ensure the flexibilities for local and regional authorities in the area of services of general economic interest as laid down in the EU Treaties.

Above all, it must be taken into account that both drinking water supply and waste water disposal is a public municipal task. Municipalities or "public authorities" can never completely dispense with this task in the interest of the common good. The guarantor's liability always remains. In view of the changes caused by climate change, guarantor's responsibility is becoming increasingly important. The municipalities must therefore be put in a position through legal requirements to fulfil their guarantor responsibility effectively and in good time and to ensure the drinking water supply for their inhabitants.

In our view, it is therefore justified that, on the one hand, the "public sector body" or "public undertaking" has the complete and unrestricted right to exploit of data with regard to the re-use and, in the water sector, even private companies can be obliged to create and store certain documents so that they can be re-used in a way that the public tasks of water management can be continued by public undertakings or public sector bodies.

No extension of the powers of the EU Commission through delegated legal acts for "high-value datasets" without charges (Article 13 PSI Directive Proposal)

The new Article 13 PSI Directive Proposal contains an obligation to open and free availability of "high-value datasets". In the proposal is completely unclear what data should actually be involved. To this end, the Commission should even be given the complementary competence to define these datasets by delegated legislation and to carry out an impact assessment if "the datasets available for free will lead to a considerable distortion of competition in the respective markets." (Article 13(3) PSI Directive Proposal). In our view it is completely unclear whether Article 13 of the PSI Directive Proposal will also affect water management and, contrary to the exceptions mentioned above, even leads to an obligation to make such data available for free through the back door (Article 6(5) of the PSI Directive Proposal). This regulation is primarily a carte blanche for the Commission to push ahead with privatisation. This would undermine Articles 4 and 5 of the Treaty on European Union.

Article 5(3) of the PSI Directive Proposal is not enough

Article 5 of the PSI Directive concerns the available formats and paragraph 3 states: "On the basis of this Directive, public sector bodies and public undertakings cannot be required to continue the production and storage of a certain type of documents with a view to the re-use of such documents by a private or public sector organisation."

In principle, we welcome the regulation, but it is completely inadequate if it is limited to "certain types" of documents. From our point of view, the point must be that this directive must not oblige a public sector body or a public undertaking at all to continue the production and storage of documents with a view to their further use by a private actor.

Amount of charges and "high value datasets" (Article 6 PSI Directive Proposal)

By the supply of data, it cannot even be guaranteed that this benefits the public sector bodies or public undertakings sufficiently, because Article 6 of the PSI Directive limits setting the amount of charges for the re-use of data (Article 6(3) PSI Directive Proposal) and the re-use of so-called "high value datasets" must even be free of charge (Article 6(5) PSI Directive Proposal), while these restrictions do not apply to private companies.

In our view, it is only appropriate that the charges for the re-use of datasets should be "freely" calculated by public undertakings and public sector bodies or, at least in accordance with the EU principle of subsidiarity, should be set by the Member States in accordance with existing charging rules there.

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The Allianz der öffentlichen Wasserwirtschaft e.V. (AöW) is the representation of interests of public water management in Germany. Our members come from all federal states. The AöW is an alliance of institutions governed by public law and companies of water supply, wastewater disposal as well as river basin management performing their service exclusively themselves or by means of independent institutions in organizational forms governed by public law. Alone through the Membership of German Alliance of Water Management Associations (DBVW) over 2000 water organizations are represented in the AöW.