

# Policy Paper

## on the Proposal for a directive on the re-use of public sector information, 2018/0111 (COD), (PSI-Directive)

08 October 2018

Page 1

### Summary

Data is the fuel for digitisation in all areas of business and administration. Data is an important asset and the foundation for digital business models of public and private companies. Free access to data as well as their broad usage forms an important pillar for the digitisation of economy and society. With the participation of all socially relevant groups in data-driven innovation, comprehensive effects can be achieved so that both our society and our domestic economy can master the challenges of digitisation. Open data in the public sphere and business, as well as the free flow of data in public authorities and companies will drive necessary developments in all areas of digitisation. Bitkom has already outlined these points in detail in its Open Data Manifesto.<sup>1</sup> Against the background of the great relevance of data for the digital economy and the dynamic development of this area, Bitkom welcomes the project to recast the Directive of the European Parliament and of the Council on the re-use of public sector information (PSI Directive). In order to ensure ideal market conditions and a level playing field for all market players, Bitkom has the following recommendations on the draft PSI Directive 2018/0111 (COD):

1. **Clearly and comprehensibly regulate the handling of "high value datasets".**
2. **The benefits of open data must not lead to adverse market conditions for public undertakings.**
3. **Legitimate interests of public enterprises that oppose disclosure should be clearly identified and taken into account.**
4. **Open Access policy with a sense of proportion: "As open as possible, as closed as necessary".**

### Our suggestions in detail

#### 1. Clearly and comprehensibly regulate the handling of "high value datasets"

According to the provisions of Article 13, the European Commission may establish in a delegated act a list of types of so-called " high value datasets ". These would then have

<sup>1</sup> Bitkom, Open Data Manifest, <https://www.bitkom.org/Bitkom/Publikationen/Open-Data-Manifest.html> (April 2017)

Bitkom  
Bundesverband  
Informationswirtschaft,  
Telekommunikation  
und Neue Medien e.V.

**Christoph Busch**  
**New Work & Innovation**  
T +49 30 27576-233  
c.busch@bitkom.org

**Mario Sela**  
**Head of Mobility**  
T +49 30 27576-250  
m.sela@bitkom.org

Albrechtstraße 10  
10117 Berlin

President  
Achim Berg

CEO  
Dr. Bernhard Rohleder

to be made available free of charge, machine-readable and accessible via APIs. These requirements go too far. They would mean that the decision as to which data from public companies and public bodies should be made available would be taken by the European Commission. This deviates from the general principle (see also recital 22) of the PSI Directive, that there should be no obligation to pass on data. Recital 22 also contains the provision that only already published data should be affected. In addition, the provisions in Article 13 create legal uncertainty, since the concrete effects and the actual impact on public enterprises cannot be estimated. Such decisions should be made at EU level in the regular legislative process. Moreover, it is not clear why, in the case of "high-quality data sets" (Art. 13), the transfer should take place free of charge, while Recital 32 makes it possible for public enterprises to charge fees in excess of marginal costs. It should therefore also be possible here to levy charges for disclosure to third parties (in accordance with the rules of the PSI Directive). Furthermore, the "value" of data sets often only becomes clear in the process of their analysis and processing - for example in the development of digital business models - and therefore cannot be estimated in advance.

A uniform definition of high value datasets throughout Europe is advantageous for cross-border data traffic and for realising a maximum of socio-economic benefits. Practical experience clearly shows that open data provided by various government agencies within the Union varies widely in format, depth of detail and data models. This poses considerable obstacles to interoperability and thus to cross-border use.

Bitkom proposes that the current proposal for a directive should contain a restriction and clarify which types of data already published are classified as "high value datasets", in order to create uniformity and transparency. Only in this way can we guarantee non-bureaucratic, rapid and technically competent decision-making on high-quality data sets. From Bitkom's point of view, the expected socio-economic benefits generated through the use of data should be decisive. In addition, the PSI Directive should clearly regulate the cases in which charging should be possible, in particular for "high value datasets".

## **2. The benefits of open data must not lead to adverse market conditions for public undertakings.**

The current proposal extends the scope of the PSI Directive to include public undertakings, although recital 6 clearly states that "documents produced by public sector bodies of the Member States executive, legislative or judicial nature constitute a vast, diverse and valuable pool of resources that can benefit the knowledge economy". Until now, the PSI Directive's requirements have primarily applied to these authorities and public bodies. Public companies are not to be equated with public authorities. They compete with other companies, including private ones. In addition, they invest in the digital transformation in the same way private companies do, whereby the costs for this are often not borne by the public authorities, but are their own investments. Therefore, public companies that are in

competition must not be put at a disadvantage. These peculiarities must be consistently taken into account in the provision of open data by public-sector companies.

Bitkom proposes to create a level playing field in which all players (regardless of the type of company) would be subject to the same conditions and requirements. If the scope of the PSI Directive were to be extended to public companies, a clear distinction would have to be made in the application of this directive: between public companies which, as a consolidated corporation, mostly compete throughout certain sectors and those who do not face any competition. The requirements for the latter can be broadened accordingly.

### **3. Legitimate interests of public enterprises that oppose disclosure should be clearly identified and taken into account**

The provision of basic services to citizens entrusted to public undertakings in the field of public services must remain of the same quality and at the same price level. If data is made available to selected third parties, this data must also be made available to other third parties, if they fulfil the same framework conditions and requirements. The protection of trade secrets and intellectual property must be taken into account. In addition, the protection of critical infrastructures must take precedence over the obligation to make data available. If negative effects on the general public are to be expected, disclosure of data should be prevented.

Public undertakings that are in competition should be left to decide which obligations they link to the use of the data. Access should be granted accordingly to all participants of the economy with an interest in these data who fulfil the defined obligations.

### **4. Open Access policy with a sense of proportion: "As open as possible, as closed as necessary".**

The Commission's "Open Access" strategy promotes free access to publications and research data. The concept of research data is very broad. In many cases, these are data that contain sensitive competitive information or even trade secrets, are based on extensive investigations (simulations, measurement series, etc.) and cannot be protected as intellectual property - e.g. patents. It must therefore remain at the sole discretion of the data owners which of these they wish to make publicly available. Industrial participation and thus the innovative strength of the "Horizon Europe" research framework programme are threatened by compulsory and all-encompassing Open Access. In the course of amending the PSI Directive, care must be taken to ensure that trade secrets and legitimate commercial interests are adequately protected.

The term "research results" in Recital 24 is not defined as "definitions" in Article 2, in contrast to "research data". It also appears that terms are partly used in their defined sense

and are used elsewhere in a more general sense. The definitions and use of the terms "research results", "research data" and "documents" must be clear and consistent.

In addition, the PSI Directive must be consistent with the following European policy documents:

1. The Commission principle "As open as possible, as closed as necessary" in the research framework programme "Horizon Europe".

2. Article 14 in the Council conclusions on the transition towards an Open Science system, adopted by the Council at its 3470th meeting held on 27 May 2016; Brussels, 27 May 2016 (OR. en) 9526/16 RECH 208 TELECOM 100 stating that *"Optimal reuse of research data 14. UNDERLINES that research data originating from publicly funded research projects could be considered as a public good, and ENCOURAGES the Member States, the Commission and stakeholders to set optimal reuse of research data as the point of departure, whilst recognising the needs for different access regimes because of Intellectual Property Rights, personal data protection and confidentiality, security concerns, as well as global economic competitiveness and other legitimate interests. Therefore, the underlying principle for the optimal reuse of research data should be: "as open as possible, as closed as necessary"."*

Bitkom suggests establishing coherence between the different legislative texts of the Union in the field of research and innovation. Recital 24 should include the principle "as open as possible, as closed as necessary". In addition, this obligation should be limited to research data already made openly accessible by virtue of obligations under national law or agreements with research funders.

Bitkom represents more than 2,500 companies of the digital economy. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros. The members employ more than 2 million people in Germany. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.