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LAPSI POSITION PAPER NO 2: THE EXCLUSION OF “PUBLIC UNDERTAKINGS” FROM THE RE-USE OF PUBLIC SECTOR INFORMATION REGIME

BY

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FINAL VERSION

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POSITION PAPER NO 2: THE EXCLUSION OF “PUBLIC UNDERTAKINGS” FROM THE RE-USE OF PUBLIC SECTOR INFORMATION REGIME

- 1. THE ISSUE TO BE REVIEWED.** It is anticipated that the rules concerning re-use of public sector information held by public sector bodies will be subject to the impact assessment exercise under Art. 13(2) of the Directive and to a thorough review intended to explore different policy options in the area and possible legislative amendments. While in principle the whole area of the scope is subject to scrutiny, the issue for which LAPSI’s contribution is sought is more limited and is described as follows: *“Should **public undertakings** be covered by the PSI Directive? The definitions of public sector bodies and bodies governed by public law (Art. 2, recital 10), to which the PSI Directive applies, are currently taken from the public procurement Directives and public undertakings are not covered by these definitions. Should public undertakings be considered as public sector bodies in the meaning of the Directive? Are there public undertakings holding “interesting” PSI? Is e.g. the **UK Royal Mail** a public undertaking in the meaning of the Directive? Are there **different definitions of national legislation** leading to situations where bodies holding similar (public sector) data are in some Member States considered as public sector bodies (falling under the PSI Directive) and in other Member States considered as public undertakings (PSI Directive not applicable)? If public undertakings were to be covered by the PSI Directive, how should the definitions of public sector bodies and bodies governed by public law be amended? Should the definitions be detached from the public procurement definitions? Could data be considered as PSI if it was held by a privatised former public sector body?”*
- 2.** To tackle this bundle of issues, a few preliminary remarks are in place. In accordance with its purposes, the scope of application of the Directive is limited by reference to the notions of “public sector body” and of “body governed by public law” under the definition in Art. 2(1) and (2). Provided that a ‘body’ meets the requirements under letters a) to c) of Art. 2(2), it is to be considered a public sector body under Art. 2(1).
- 3.** In this connection, the limitation that the body must be established “for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character” under lett. a) of Art. 2(2) has a crucial importance in several ways. *First*, it indicates that the applicability of the PSI regime depends not on the nature (commercial or industrial, as opposed to non commercial and non industrial) of the activity, but on the character of the needs which are met by that activity. More specifically, only “needs in the general interest” qualify. *Second*, the notion is based on EU law: member States may not decide that a given entity is not a public sector body by indicating that a the task entrusted to the entity is not in the general interest (subject to the proviso referred hereafter in § 5), as the qualifying character of the need is a question of EU law, not of member State law. *Third*, to the extent the requirements under lett. a) and lett. c) of Art. 2(2) are met, it is sufficient that the body has a legal personality. The fact that an entity is established as a private body, such as a company, a corporation, an association or a foundation, does not detract that, to the extent it meets the requirement in lett. c) and it is established “for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character” under lett. a) of Art. 2(2), then it has to be understood as a “body governed by public law” for purposes of the PSI Directive. Indeed, lett. b) indicates that, in order to qualify under Art. 2(2) it is sufficient that the body possesses a “legal personality”, so that no difference is attached to the fact that such legal personality is based on private or public law.

4. This preliminary analysis is intended to address a specific issue, which could be indicated with the term “risk of carving out”. The Directive works towards the fundamental and overarching aim of contributing to the establishment of an internal market (Recital 1) and more specifically to “the creation of conditions conducive to the development of Community-wide services” (Recital 5). A “broad cross-border geographical coverage [of the relevant information services] will be essential in this context” (Recital 5). Therefore, it is essential that all provisions of the Directive, including the ones concerning its scope of application, are consistent with the objective of the **creation of conditions conducive to the emergence of cross-border, EU-wide information services**. This objective is liable to be revoked in question and even jeopardized, to the extent the member States are in a position to carve out from the PSI regime certain national entities, which, for one reason or other, they may desire to exempt from the Directive’s rules. Indeed, the possibility of seamlessly linking the data sets from 27 jurisdictions on the input side and of making them available to a market composed of the residents of the same 27 jurisdiction on the output side may in some cases be a precondition for capturing the added value of the cross-border service, in others even be a precondition for its economic viability and sustainability.
5. It is unfortunate therefore that the Directive gives member States the possibility of carving out an important slice of PSI under the provision in lett. a) of Art. 1(2), whereby “the Directive shall not apply to a) documents the supply of which is *an activity falling outside the public task* of the public sector bodies concerned as defined by the law or by other binding rules in the member State, or, in the absence of such rules as defined in line with common administrative practice in the member State in question”. It may be noted that this provision introduces an unfortunate uncertainty, as it opens the question of establishing what may be the relationship between the “general interest” characterizing the needs met by public sector bodies subject to the Directive on the one side and the “public task” which makes an activity falling within its scope – and the documents incidental to it – subject to the Directive. This unfortunate uncertainty is multiplied by the fact that, even if we were to assume that the twin notions of general interest and public task at least to a certain extent overlap, this (tentative) coincidence would at best be provisional and precarious. This is so because, while the notion of “need in the general interest” is, as earlier indicated, rooted under EU law, the notion of public task is not. More specifically, it is subject to erosion by legislative action and executive decisions in the member States. Indeed, it is left to each member State to define – if not directly the notion of “public task” of the public sector body, and of the activity falling within it – at least the flip side of the same coin, by deciding what is “an activity falling outside the scope of the public task of the public sector body”. That the decision is taken at member State level is clearly shown by the second part of the same lett. a) of Art. 1(2), whereby “the scope of the public task” or even the notion of “activity falling outside the scope of the public task” is “defined” not by EU rules but “by the law or by other binding rules in the member State, or, in the absence of such rules as defined in line with common administrative practice in the member State in question”.
6. Unfortunate as the “carve out risk” illustrated in §§ 4-5 above may be, it at least has one redeeming feature: it serves the purpose of balancing the quest for EU-wide definitions of the scope of the novel PSI regime and the claims by member States to retain a say in the definition of the “activities falling outside of the scope of the public sector body concerned”. Much more questionable is the rationale for the “carve out risk” entailed by the (apparent) exclusion of public undertakings from the scope of the PSI Directive.
7. To begin with, the exclusion of public undertakings from the scope of the Directive is not

spelled out expressly from any provision of the Directive. Rather, it may be inferred from Recital 10, which, after stating that “the definitions of ‘public sector body’ and ‘body governed by public law’ are taken from the public procurement Directives (92/50/EEC, 93/36/EEC and 93/37 and 98/4/EC)”, goes on to state – rather cryptically –: “Public undertakings are not covered by *these* definitions”.

8. We may assume that the rationale for deriving the notion of ‘public sector body’ and of ‘body governed by public law’ from public procurement Directives is to enable reliance on a EU law-based notion which is not subject to the vagaries of member States legal orders. This option does make sense, at least in principle. The trouble comes when we consider that the definition again has a reverse side, i.e. that “public undertakings are not covered by *these* definitions”. This would be acceptable if and to the extent that we could conclude that a public undertaking i. never is a public sector body; and ii. that this holds true both at the procurement level, where the entity in question is engaged upstream, in purchasing activity; and at the level to which the PSI Directive becomes relevant, i.e. also downstream, in connection with the supply to candidates to re-use of data sets generated in the course of the entity’s primary activity.
9. We need not to go into the first limb of the question, i., as this is a matter for procurement law to decide.¹ What is relevant here is the conclusion to be reached in connection with the second limb of the question, ii. A public undertaking typically is engaged not only upstream, in the purchase of goods, but also downstream, in the supply of goods and services. If this is so, then it may well happen that the downstream activity may be characterized as “meeting needs in the general interest, not having an industrial or commercial character” under lett. a) of Art. 2(2), and the entity established to meet such general interest needs then has to be understood as a “body governed by public law” for purposes of the PSI Directive in accordance with the criteria illustrated above in § 3. This means that entities which could qualify as public undertakings under the public procurement Directives also qualify as public sector bodies, at least for purposes of the PSI Directive.
10. If this is the case, then the final part of Recital 10, which states “Public undertakings are not covered by *these* definitions”, should be understood as meaning that public undertakings, while always exempted from the application of public procurement rules, may or may not be exempted from the PSI regime depending on the circumstances. In this perspective, the statement in the final part of Recital 10 creates uncertainty. This uncertainty is both unnecessary and damaging.
11. The uncertainty is unnecessary, as a criterion which serves a useful purpose in the procurement context, where it helps to establish which entities are subject to the public procurement rules, does not carry out the corresponding function in the field of PSI rules, where there may be entities which may be considered public undertakings but still are subject to the Directive.
12. This uncertainty may be prejudicial to the uniform interpretation of the Directive across time and across space and may lead to another unwelcome “carve out” of certain data sets from the scope of the Directive. What if an entity which originally was established under public law in member State X is privatized? Are there reasons to argue that it has become a public undertaking and therefore no longer is subject to the PSI Directive?² If so, the status of the

¹ It should be noted however that also public procurement rules provide that in some specific sectors public undertakings are subject to the public procurement regime. See Art. 20 of Directive 2004/17/EC and Art. 8 of Directive 2004/18/EC.

² In Italy the Poste s.p.a. has been held no longer to be a public sector body since it has been transformed into a company not for

documents held by that entity would change overnight. Additionally, a discrepancy could be instituted between that specific entity and another one in a different member State Y, which, while “meeting” the same “need in the general interest, not having an industrial or commercial character” under lett. a) of Art. 2(2), as the one in member State X, has not been privatized. The prejudice to the uniform interpretation of the Directive would run directly contrary to the objectives of the Directive. The very possibility that certain data sets cease to be available at some unforeseeable future as a result of organizational change unilaterally brought about by a member State would entail a risk which adversely affects even the possibility of the emergence of markets in value-added services based on these data sets to begin with. Typically, these value-added services entail a large, or even huge, initial outlay, which justifies an initial investment to the extent the revenue stream necessary to recoup it is foreseeable with a reasonable degree of certainty. The very idea of fostering the creation of cross-border, EU wide services would be endangered, if organizational changes in member States would be sufficient to cause the withdrawal of data sets and the decrease in the territorial scope of the service offered to the market.

13. It is therefore suggested that the last part of Recital 10 is amended, to adopt the following wording. “For purposes of application of this Directive, ‘public sector bodies’ and ‘bodies governed by public law’ shall be considered such under the relevant provisions of this Directive, irrespective of the fact that they may or may not be public undertakings”. Another alternative would consist in omitting any reference to public undertakings and accordingly deleting the last part of Recital 10.

purposes of applying the PSI regime but in view of assessing whether a private bidder which had successfully rendered services to Poste would be able to take credit of this experience in another bid for a different local public sector body (the Veneto Region in the North East of Italy): *see* TAR Veneto 29 luglio 2009, T-Systems Italia s.p.a. c. Regione Veneto – Centro Sviluppo Servizi Territoriali. On the other hand, it appears that the Magyar Posta is considered not subject to the PSI Directive, because, while meeting needs in the general interest, it is deemed to carry out not a public function but a public service. Currently, the correctness of this opinion is subject to EU law (as indicated in § 3). It is submitted that, if the Magyar Posta would be privatized and/or fall under the notion of public undertaking under Hungarian legislation, the conclusion that it is not subject to the Psi Directive would be conclusively settled by national law.