
September 2012

Lower fees for re-use of public sector information – the PSI Directive and cases from the Swedish Competition Authority

To enable a broader and more effective market for re-use of information collected by public sector bodies the EU decided in 2003 to introduce a common set of minimum rules regulating these questions. The rules contain amongst other things a limitation of how high the fee charged for public sector information may be calculated. The Swedish Competition Authority has investigated two competition cases during the last six months concerning such information regulated in the PSI Directive. Partner Elisabeth Eklund and associate Oscar Jansson comment on the rules of re-use of public sector information and the decisions and cases on the matter.

Background – the PSI Directive regulates how public sector bodies shall provide information

In an attempt to establish and facilitate the expansion of information-based markets the Directive 2003/98/EC on the re-use of public sector information (the “PSI Directive”) was adopted in 2003. The aim is that the information collected by the public sector bodies as part of their public task shall be made available for re-use, to enable combination with other PSI-information and for the information to be presented in new products and services. The information is called PSI-information or open data. If PSI-information can effectively be re-used to the extension the Union has set as a goal the market size within the EU is estimated to 140 billion euro and 30 billion SEK in Sweden. At the moment only 20 % of the potential market is being exploited. Some examples of new Swedish services implementing PSI-information are “Tågtavlan” and “Sök operatör” (both are smartphone applications).

The PSI Directive is a so called minimum directive which introduces a common set of basic obligations that each Member State has to implement. The directive does not contain an obligation to allow re-use of public sector information but regulates the conditions for such information that have been made accessible for re-use. The PSI Directive does not therefore affect the principles of public access to official records. The directive regulates that those public documents that have been made public shall be made accessible for re-use by private persons and undertakings and prohibits any exclusive agreements. Unfortunately, these rules have not been in focus in Sweden for as long as they have been in other Member States since the directive was implemented approximately five years too late, through the PSI Act (2010:566), however, the rules have been applicable in Sweden since 2005 when the implementation period for the directive ended. Further, it has been questioned whether the PSI Act is a correct implementation of the provisions in the PSI Directive.

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A central provision in the PSI Directive concerns the upper limit for the fees charged for re-use. When fees are charged they shall not exceed the cost of 'collection, production, reproduction and dissemination, together with a reasonable return on investment' (Article 6 of the PSI Directive). However, the goal of the PSI Directive is that the pricing shall be set to the marginal cost, i.e. the cost of providing the information. At present there is no supervisory authority nor a redress mechanism in case an undertaking or private person wants to question whether a public sector body is acting in accordance with the PSI Directive. However, in 2012 the Swedish Competition Authority has in two separate cases investigated whether the charges for PSI-information have been unlawful according to the Swedish Competition Act (2008:579) (the "SCA"). In both cases the public sector bodies have decided by their own initiative to substantially decrease their charges.

The Competition Authority's investigation regarding the Swedish Patent and Registration Office

The Swedish Patent and Registration Office ("PRO") provided two services concerning trademark information, firstly, a free service that the general public had access to and could use on the PRO's website, secondly, a so called "register copy" (a copy of the trademark registry in a machine-readable format) that was sold to parties that re-used the data in its own products. The fees that PRO charged were set a level which covered both the costs of labour but also the development of the standard that was used when supplying the information.

The Competition Authority initiated an investigation to clarify whether SMHI's action infringed any of the provisions of the Competition Act.

During the investigation the PRO decided to reduce the fee from 100 000 SEK per annum (as well as a starting fee of 75 000 SEK) per user to 40 000 SEK divided between all users. Due to this decision the Competition Authority decided to write off the investigation without making any formal decision in the matter.

The Competition Authority also investigates a matter, after a complaint, against the Cadastral Authority

The second case concerned the Swedish Metrological and Hydrological Institute ("SMHI") (case number 800/2011). SMHI is an expert authority within the areas of weather, water and climate. It has a wide area of responsibility and collects much information within the scope of its public task. SMHI also sells services which have connections with its public task as well as information it collects while conducting its public task. Despite that the same information is used by both the commercial parts of SMHI as well as the third parties that SMHI sells the information to the commercial part of SMHI did not pay for the information.

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During the investigation SMHI decided to substantially lower the fees to a level that was equal to the marginal cost. The NCA wrote off the matter on 2 July 2012. SMHI have later in media statements stated that a lot of information will be made available for free; however interested parties may have to wait until 2014 before such access is developed.

The Competition Authority is also investigating the pricing by the Cadastral Authority
 The Competition Authority also investigates a matter, after a complaint, against the Cadastral Authority.

The Administrative Court of Appeal has examined pricing issues regarding telecom sector regulation

The Stockholm Administrative Court of Appeal recently issued a judgment in a case where parallels can be drawn to the pricing regulation according to the PSI Directive (judgment of 27 June 2012, case no 6344-10, TeliaSonera AB v. the Swedish Post and Telecom Agency ("PTS") and Infodata AB). The case concerned a provision in the Electronic Communications Act (2003:389) which is based on EU directives (the ONP Directive 98/10/EC which was replaced by the USO Directive 2002/22/EC). According to these directives companies that operate telephone directory enquiry services should be able to receive information on all subscribers from the telephone operators. The terms for access should be "fair, cost-oriented and non-discriminatory" (Chapter 5, Section 7, third paragraph ECA). The case concerned how large of a fee that should be paid by Infodata to TeliaSonera for the subscriber information requested by Infodata. As the Electronic Communications Act enables a redress mechanism before the PTS the agency examined which costs that could be included and how large these should be. The decision was appealed by TeliaSonera to the Stockholm County Administrative Court and later to the Stockholm Administrative Court of Appeal (case no 6344-10). The Administrative Court of Appeal considered that cost-oriented terms implied that there was a requirement for partly that the underlying costs should have occurred as a result of the obligation to supply the subscriber information, partly that these costs must be necessary for the obligation to be completed. The judgment had as its effect that Infodata had to pay 105 000 SEK (per group of subscribers) in comparison to an additional 1 409 000 SEK that TeliaSonera had demanded. The judgment cannot be appealed.

A new and revised PSI Directive

The EU Commission is currently in the process of revising the PSI Directive. An extension of the scope of the application of the PSI Directive is proposed, which will cover some cultural sectors that previously were exempted. In the proposal it is also proposed that a supervising authority should be implemented in each Member State in order to guarantee observance of the rules and that an effective and efficient redress mechanism should be created.

Another important proposal is that authorities only should be able to charge the marginal cost which in many cases would radically lower the costs for companies that want to re-use information. The proposal also includes that the burden of proof regarding the level of the fee should rest with the authority in question.

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If the current timeframe is followed the EU Parliament should make its decision to accept the new PSI Directive at the end of the year.

Concluding remarks

The PSI Directive and the PSI Act have created opportunities for wide access to open data that can be used by both large and small companies.

This has meant that older applications can access the raw data that they require to a lower cost but it has also enabled development of new and innovative products.

Unfortunately the PSI Directive has not had a full impact in Sweden as many authorities impose conditions on re-use in direct violation of the PSI Directive such as that the information may not be re-used or that requests for re-use are not handled in a timely manner or that they continue to charge too high fees. As is clear from the PSI Directive and as is also clear from the special regulation that was under consideration in the TeliaSonera-case costs must be clearly accounted for if they are to be used as a basis for a fee.

In the proposal for a new PSI Directive the question regarding low charges for information is even more in focus and the marginal cost is proposed as the general rule instead of being merely a goal. We will monitor the authorities that already today lead by example by giving away information without costs with great interest and we look forward to the new PSI Directive. Once the new PSI Directive has been adopted we will in a future newsletter explain the consequences for both the authorities that are to provide data and for the companies that will use the data, hopefully to a much lower cost.



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