
September 2013

A new PSI Directive for more and cheaper re-use of information

On 26 June the European Union decided on new rules on re-use of public sector information. The new rules include several updates, such as a change of the general rule on charging towards a margin-oriented fee – which will mean lower costs for reproducing data for a number of companies and at the same time lower incomes for a lot of Swedish authorities – and inclusion of cultural institutions as public sector bodies, increased transparency regarding calculation of the fees, introduction of a redress mechanism and introductions of portals for open data. Elisabeth Eklund, partner, and Oscar Jansson, associate comment below on the revised rules.

Public sector information (“PSI”), i.e. information held by public authorities, as a basis for the digital information sector has come into focus more and more during the last couple of years. The development in the sector was accelerated in the EU by the introduction in 2003 of the current PSI Directive, Directive 2003/98/EC on the re-use of public sector information (the “PSI Directive”). The PSI Directive introduced requirements on conditions for access to PSI from public sector bodies, however the directive cannot be used by undertakings and individuals as a basis to access information as access to documents is still up to national legislation. Re-use of PSI is a huge business, if properly used, the potential market is according to estimates € 140 billion in the EU and SEK 30 billion in Sweden. For further information on the current rules and some legal proceedings in this field in Sweden see [Delphi’s newsletter from September 2012](#).

The PSI Directive is now to be amended in accordance with Directive 2013/37/EU amending Directive 2003/98/EC on the re-use of public sector information (“the new PSI Directive”). The new PSI Directive – which has slowly made its way through the EU bureaucracy and was decided on 26 June – has been long awaited and was preceded by an evaluation of the current PSI Directive. The major changes are presented below.

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Margin-based charging – a dramatically lowering of fees in certain instances

The PSI Directive has a cost-based oriented charging composition even if it was possible for authorities to apply a margin-based approach or even grant access to information for free. The fees charged should not exceed the cost of 'collection, production, reproduction and dissemination, together with a reasonable return on investment' (Article 6 of the PSI Directive). The aim of the PSI Directive is however that the pricing shall be set to the marginal cost, i.e. the cost of providing the information, or that the information shall be provided for free. Despite the ambition such low fees were rarely applied. In the new PSI Directive the marginal cost incurred for reproduction, provision and dissemination has been set as the general rule. Thus, the cost of collection has been dropped as one base for the fee. It represented a very large part of total costs for data so it will substantially lower the costs. Thereto there is now a connection between actual costs incurred and fees charged which was not the case before.

The fees charged have been one of the biggest problems in application of the PSI Directive when certain authorities have claimed unreasonable fees for data that in principle could be provided based on the marginal cost as the collection was already paid for by appropriations (plus a possible reasonable return on investment that is also allowed). However, even in the new PSI Directive there are exceptions to the general rule. The new PSI Directive grants the Member States the possibility for exceeding the marginal cost in three cases, namely:

- when the public sector bodies are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks;
- by way of exception, documents for which the public sector body concerned is required to generate sufficient revenue to cover a substantial part of the costs relating to their collection, production, reproduction and dissemination. Those requirements shall be defined by law or by other binding rules in the Member State. In the absence of such rules, the requirements shall be defined in accordance with common administrative practice in the Member State and;
- for libraries, including university libraries, museums and archives.

Thus, there is still a possibility for the public sector bodies to charge a higher fee and we anticipate some legal cases to be initiated as regards these exceptions.

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Already under the current legal regime there are certain requirements as regards transparency regarding the calculation of the fees and these requirements are further enhanced in the new PSI Directive.

Redress mechanism – possibility to challenge fees

The new PSI Directive introduces a requirement for a redress mechanism. The redress body must be impartial with the appropriate expertise and with the possibility to impose binding decisions upon the public sector body. The redress mechanism could according to the new PSI Directive either be placed within the national competition authority or some other authority or court with the possibility to impose such decisions.

Open format, standards and portals

The new PSI Directive clarifies that the public sector bodies must, unless it entails a disproportionate response going beyond a simple operation, provide the information in any pre-existing format or language and if possible in an open and machine-readable format together with metadata. The format and the metadata shall as far as possible follow formal open standards. If the public sector bodies complies with this requirement it will provide even more possibilities for companies to effectively re-use the information in its business.

Further, according to the new PSI Directive Member States shall make practical arrangements facilitating the search for documents available for re-use through establishment of portal sites with links to data sets and with relevant metadata.

A few Member States have come very far in its listing of data sets, such as the UK (data.gov.uk). The Swedish government has also introduced such a portal that can be found on oppnadata.se but it is not as extensive as the UK one. The EU has published a portal that can be found at open-data.europa.eu.

Inclusion of cultural establishments

Under the PSI Directive there is an exception for cultural establishments. The new PSI Directive does however introduce PSI access conditions on some cultural establishments, namely libraries, museums and archives. Other types of cultural establishments are however still excluded from the scope of the new PSI Directive.

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The new PDI Directive introduces several limitations on what data that cannot be considered as PSI. For example the following points are excluded:

- Where documents access is restricted by virtue of the access regimes in the Member States, including cases whereby citizens or companies have to prove a particular interest to obtain access to documents;
- parts of documents containing only logos, crests and insignia, and;
- documents access to which is excluded or restricted by virtue of the access regimes on the grounds of protection of personal data.

Introduction of the new provisions in Swedish legislation

The PSI Directive is a minimum directive which means that it must be implemented in national legislation. The new PSI Directive contains amendments to the current PSI Directive and the changes must thus be implemented into Swedish legislation. The implementation must be made by 18 July 2015.

Sweden was some five years late to implement the PSI-Directive – which was to be introduced in 2005 – when the Swedish PSI Act (Sw: Lag (2010:566) om vidareutnyttjande av handlingar från den offentliga förvaltningen) entered into force in 2010. This time however Sweden has already taken several steps to initiating the transposition process. The Government has initiated a governmental investigation (Sw: Dir 2013:2, Bättre förutsättningar för vidareutnyttjande av handlingar från den offentliga förvaltningen) on what changes that are required which will result in recommendations on the necessary changes. The investigation will be presented by 30 October 2013.

Comments

We consider that many of the changes in the new PSI Directive are positive. In our experience, one of the biggest problems with the PSI Directive has been the excessive fees charged for data. Thus, that the cost for collection of information has been dropped and replaced by a general rule of marginal costs incurred is very positive. This will have a concrete effect in many commercial applications. However, there is a slight cause for concern. The exception that in cases when the public sector bodies “are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks” may, depending on the interpretation of the authorities be applied very broadly. We look forward to that the Government clearly indicates that this should be the exception and not a rule applied by too many authorities.

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In Sweden the administrative courts have been the redress mechanism available under the PSI Act. However, an appeal need to be made within three weeks from receipt of the decision and the complainant has to bear its own legal costs for the court proceedings which may take several years. In our view a specialised redress body would be even better as it would guarantee more competence and experience with these cases compared to when the cases are handled by a number of different courts depending on where the authority in question is situated. With the introduction of portal sites listing data sets, further transparency regarding calculation of the costs, the marginal cost for the information and a simpler redress mechanism we have high hopes for a positive development in the information intensive sector.

As the Swedish investigation on how to transpose the new PSI Directive is still on-going we will have ample opportunity to get back on the updates before they take effect.



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