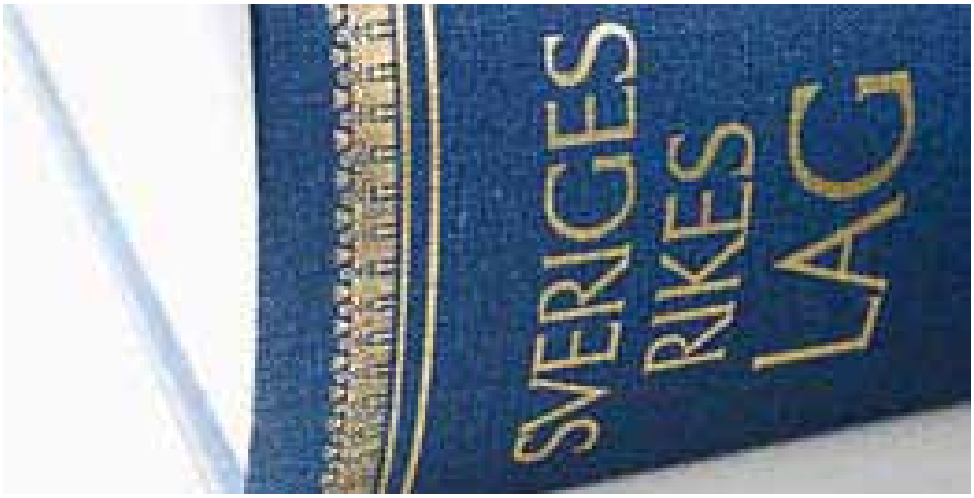

Business Activity and Exclusive Right in the Swedish PSI Act

Uppdragsforskningsrapport 2011:2

skriven av

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för Konkurrensverket

KONKURRENSVERKET
Swedish Competition Authority

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Förord

I Konkurrensverkets uppdrag ligger bland annat att främja forskning på konkurrens- och upphandlingsområdet.

Konkurrensverket har gett Björn Lundqvist och Marc de Vries i uppdrag att klargöra begreppen ”affärsverksamhet” och ”exklusiv rätt” i lagen om vidareutnyttjande av handlingar från den offentliga förvaltningen (PSI-lagen). Medförfattare har varit Emma Linklater och Liisa Rajala Malmgren.

Till projektet har knutits en referensgrupp. Den har bestått av Johan Hedelin, Rinel Patel och Joakim Wallenklint, samtliga från Konkurrensverket.

Det är författarna som svarar för slutsatser och bedömningar i rapporten.

Stockholm, september 2011

Dan Sjöblom
Generaldirektör

Innehåll

Sammanfattning

I enlighet med det givna uppdraget från Konkurrensverket är syftet med rapporten att klargöra innebörden av begreppen "affärsverksamhet" och "exklusiv rätt" så som de används i lag (2010:566) om vidareutnyttjande av handlingar från den offentliga förvaltningen (PSI-lagen). Dessa formuleringar har används i PSI-lagen i syfte att inkorporera det Europeiska PSI-direktivet i svensk lagstiftning.

Vikten av att förstå konkurrensrättens roll

Konkurrensrätten spelar en viktig roll eftersom den var den främsta källan till inspiration för PSI-direktivet. PSI-direktivet ligger dock i gränssnittet mellan konkurrensrätt, upphovsrätt, IT-rätt och den konstitutionella rätten att ta del av allmänna handlingar vilket gör direktivet svårtillgängligt. I svensk rätt kommer PSI-lagen att få genomslagskraft genom konkurrensrätten. Framförallt KL 3 kap 27 § kan bli tillämplig i det fall PSI-lagen har överträtts. Det finns dock begränsningar i PSI-direktivets och PSI-lagens tillämplighet i förhållande till upphovsrättskyddade dokument och sekretesslagstiftning. Frågan är dock om och hur dessa ställningstaganden ska tas i beaktning vid en konkurrensrättslig bedömning.

Offentligt uppdrag och affärsverksamhet

Termerna "offentlig verksamhet" och "affärsverksamhet" utgör fundamenten för att kunna avgöra om PSI-direktivet respektive PSI-lagen kan komma att bli tillämpliga. Om handlingarna inte uppkommer inom ramen för en offentlig verksamhet, kan PSI-direktivet inte tillämpas. Detsamma gäller för PSI-lagen, där dokument som tillhandahålls som en del av affärsverksamhet är undantagna från lagens tillämpningsområde.

I rapporten anges att den svenska lagstiftarens val att implementera ”icke offentlig verksamhet" genom uttrycket "affärsverksamhet" (en term "lånad" eller vidareutnyttjad från den svenska lagen om upphovsrätt till litterära och konstnärliga verk). Valet förefaller var mindre lyckat. Teoretiskt, för det fall en myndighet primärt sysslar med en verksamhet som både är en offentlig verksamhet och en affärsverksamhet, finns det en klar risk att PSI-lagen inte blir tillämplig och därmed kan PSI-lagen anses snävare än PSI-direktivet. Således skulle PSI-lagen, i vart fall i teorin, inte blivit implementerad i svensk rätt på ett korrekt sätt.

Därför bör begreppet "affärsverksamhet" i § 4 av PSI-lagen ges en innebörd som överensstämmer med PSI-direktivet, samt som är oberoende av begreppet "kommersiell verksamhet" och definitionen av affärsverksamhet i upphovsrättslagen. Generellt bör affärsverksamhet i § 4 PSI-lagen tolkas i ljuset av konkurrensrätten och spegla skillnaden, i svensk rätt och administrativ offentlig

praxis, mellan en myndighets grundläggande ansvar och den verksamhet som myndigheten valt att tillhandahålla som en service-funktion.

En liknande tolkning av begreppet ”affärsverksamhet” bör ske i § 9 PSI-lagen, men med den skillnaden att under § 4 PSI-lagen är det den ursprungliga verksamheten som ska analyseras, och inte den verksamhet inom vilket handlingarna vidareutnyttjas. Den verksamheten skall analyseras under § 9 PSI-lagen. Det är således två olika verksamheter som är under beaktande i §§ 4 och 9.

Det bör dock förekomma en skillnad i tolkningen av affärsverksamhet i § 4 och § 9 av PSI-lagen. Under ”affärsverksamhet” i § 4, till skillnad från § 9, bör en verksamhet som både är en affärsverksamhet och en offentlig verksamhet tolkas i ljuset av PSI-direktivet. En sådan verksamhet, med beaktande av EU-rättens företrädesrätt, bör trigga en tillämpning av (§ 4) PSI-lagen. Å andra sidan, bör ”affärsverksamhet” i § 9 PSI-lagen tolkas i ljuset av ”kommersiell verksamhet” i Art 10(2) PSI-Direktivet. Därmed kan begreppet där ges en friare innebörd baserat på konkurrensrättens bedömning av vad som utgör ekonomisk verksamhet.

Om en annan tolkningsmetod av § 4 i PSI-lagen skulle nyttjas, kommer den svenska PSI-lagen inte att omfatta det som bör omfattas av PSI-direktivet och ett effektivt vidareutnyttjande av denna typ av information i Sverige skulle inte säkerställas. Generellt bör metoden under PSI-lagen vara i överensstämmelse med PSI direktivet annars är risken stor att lagstiftaren återigen måste ta sig an PSI Direktivet och implemmenteringen av PSI-lagen.

Ett övergripande trestegstest för när lagen blir tillämplig kan skönjas:

För det första, enligt § 4, är frågan huruvida det ursprungliga tillhandahållandet av dokumenten skedde inom ramen för en affärsverksamhet eller inte. I svensk rätt bör det innebära att den verksamhet som ska analyseras är den genom vilken handlingen blev allmän enligt grundläggande konstitutionella principer. Om denna verksamhet inte är en affärsverksamhet blir PSI-lagen tillämplig (om inte andra undantag är tillämpliga)[1]. Om verksamheten i fråga både är en affärsverksamhet och en offentlig verksamhet, bör § 4 bli tillämplig. Under § 4 PSI-lagen har ”offentlig verksamhet” tolkningsföreträde framför affärsverksamhet.

För det andra, i § 6 är frågan om dokumenten kommer att användas för annat ändamål än det ursprungliga ändamål för vilket de tillhandahölls, dvs. om dokumenten vidareutnyttjas. § 6 anger inte som krav (i) att det nya ändamålet måste vara kommersiellt eller ekonomiskt, dvs. en affärsverksamhet, eller (ii) att det överhuvudtaget är frågan om olika verksamheter. § 6 anger enbart att ändamålet ska ha ändrats för att ett vidareutnyttjande ska anses vara för handen.

[1] PSI-lagen behandlar endast frågan om hur en myndighet ska hanskas med handlingar som vidareutnyttjas, inte t.ex. om det finns en rätt att få ut handlingar.

För det tredje, enligt § 9, för det fall det är myndighetens eget vidareutnyttjande som ska analyseras, är frågan om verksamheten där handlingarna vidareutnyttjas är en affärsverksamhet. Det bör här framhållas att § 9, eller den svenska PSI-lagen som helhet, ej stadgar som krav att den verksamhet där handlingarna ska vidare-utnyttjas inte kan vara en offentlig verksamhet. Men andra ord, om verksamheten i fråga både är en affärsverksamhet och en offentlig verksamhet, så är § 9 tillämplig. Under § 9 PSI-lagen har således ”affärsverksamhet” tolkningsföreträde.

Exklusiv rätt

I motsats till termen "affärsverksamhet" har termen "exklusiv rätt" i PSI-lagen implementerats i överensstämmelse med motsvarande term i PSI-direktivet. Tyvärr utvecklas det inte närmare i PSI-direktivet om förbudet mot exklusiva rättigheter endast tar sikte på överenskommelser mellan en offentlig myndighet och en annan entreprenör eller även täcker in arrangemang som ger rättigheter till mer än en (men ett begränsat antal) entreprenörer.

Trots frestelsen att tolka begreppet " exklusiv rätt" i Art 11 i PSI-direktivet som en motsvarighet till den identiska formuleringen i Art 106 i TFEU (och på så sätt begränsa omfattningen av begreppet till en situation där det endast finns en exklu-siv rättighetshållare), skulle konsekvenserna vara att detta troligen strider mot syftet med PSI-direktivet varför detta snäva synsätt bör undvikas.

Alla arrangemang som begränsar möjligheterna till vidareanvändning, oavsett om de gäller en tredjepart eller flera, bör därför anses omfattas av Art. 11. Det särskilda omnämnandet av både speciella och exklusiva rättigheter i Art 3 i direktivet om offentlig upphandling stöder denna breda definition, särskilt då EU-kommissionen i sitt stödjande uttalande hänvisar till just anbudsförfaranden. Med tanke på syftet med Art 11 (att avlägsna hinder för vidareanvändande) och den omgivande kontext som presenterats genom EU-kommissionens stöduttalande, är det troligt att anbudsförfaranden för vidare-användande av handlingar från den offentliga förvaltningen var avsedda att om-fattas av Art 11.

Således bör §§ 8 och 10 i PSI-lagen till viss del vara överlappande, men med den skillnaden att § 10 och Art 11 i PSI-direktivet, som bör vara ledande vid en tolkning av § 10 PSI-lagen, uppställer färre rekvisit än § 8 PSI-lagen samt även stipulerar ett förbud. §§ 8 och 10 bör således beaktas parallellt, men § 10, tolkat i ljuset av Art 11 PSI-direktivet, bör i första hand bli tillämpligt.

Slutsatser

Införlivandet av PSI-direktivet i nationell lagstiftning är inte en lätt sak, med tanke på de olika rättsområden som berörs. Den svenska lagstiftarens avsikt har helt klart varit att skapa ett snävt undantag genom att i § 4 i PSI-lagen enbart utesluta hand-lingar som en myndighet använder i sin egen affärsverksamhet. Detta begrepp ska

tolkas i enlighet med PSI-direktivet, och således bör begreppet inte inkludera någon ”offentlig verk-samhet”.

Däremot bör termen exklusiv rätt ges en vid tolkning. I båda fallen skulle det vara fördelaktigt om ytterligare vägledning skulle utfärdas rörande tolkningen av dessa båda termer, exempelvis genom ett beslut av Konkurrensverket eller från en domstol.

Slutligen verkar det troligt att EU-kommissionen kommer att vidta åtgärder för att förtydliga eller ändra PSI-direktivet i samband med en översyn 2012. Under sådana omständigheter kan den svenska delegationen uppmärksamma frågan om tolkningen av dessa två termer, liksom vissa andra, i samband med de förestående förhandlingarna.

Summary

Under the assignment of the Swedish Competition Authority (SCA) this report clarifies the meaning of the terms ”business activity” and ”exclusive right” as they appear in sections 4 and 10 of the Swedish PSI Act (PSI Act). These formulations have been used in the PSI Act to incorporate the European PSI Directive (PSI Directive) into Swedish law.

Understanding the role of competition law is vital

Competition law plays an important role throughout this report, as it has been the main source of inspiration for the PSI Directive with obvious consequences for the implementation thereof in the PSI Act. The PSI Directive is, however, a piece of legislation that is situated at the interface between: competition law, freedom of information law, ICT law and intellectual property law, making the directive difficult to penetrate and, hence, to implement. Under Swedish law, the PSI Act may be executed through the Swedish Competition Act. Chapter 3, section 27 of the Swedish Competition Act is likely to be triggered in the event that the PSI Act has been violated. Nonetheless, there are limitations to the PSI Directive and to the PSI Act, in relation to IP and ICT law.

Public task and business activity

Both ”public task” and ”business activity” are the main fundaments of the PSI Directive and the PSI Act, respectively, setting the demarcation line for their applications. If documents are not generated under the public task, the PSI Directive does not apply and the same holds true for the PSI Act, where documents supplied as a business activity are exempted.

The decision of the Swedish legislator to implement the term ”public task” through the term ”business activity” (a term ”borrowed” or re-used from the Swedish Copyright Act) appears to be less fortunate, as, judging from the preparatory works of the PSI Act, the point and level of connection do not correspond, since the term business activity is connected to the term ”commercial activity” mentioned in article 10(2) of the PSI Directive (which applies to further re-use by the public sector body itself), instead of the term public task, which sets the scope in Article 2(1) of the Directive. The term public task can include commercial activities under the PSI Directive. In fact, if an activity is both a business activity and a public task, the PSI Act risks not being applicable, while the PSI Directive stipulates that it should be applicable.

The term "business activity" in section 4 of the PSI Act should therefore be given a meaning that is consistent with the PSI Directive, independent of the term "commercial activity" and the definition of the business activity in the Swedish Copyright Act. In principle, business activity in section 4 of the PSI Act, interpreted

in light of competition law, should reflect the difference, under Swedish law and public practice, between a PSB's basic responsibilities and the activities which the authority has chosen to provide as a service.

A similar interpretation of "business activity" should be conducted in sections 4 and 9 of the PSI Act, but with the difference that under section 4 of the PSI Act the initial activity is to be scrutinized, and not the activity where the documents are re-used. There are thus two different activities that are under consideration in sections 4 and 9, respectively.

There might be a difference in interpretation of the term "business activity" in section 4 compared to section 9 of the PSI Act. In the light of the PSI Directive, and taking into consideration the principle of supremacy of EU law, section 4 of the PSI Act should be applicable when the requirements of "public task" are fulfilled. Thus, section 4 of the PSI Act needs to be triggered by an activity which is both a business activity and a public task. Otherwise, the PSI Act stipulates too narrow of a scope in light of the PSI Directive.

In comparison, business activity in section 9 of the PSI Act should be interpreted in light of "commercial activities" in Art 10(2) of the PSI Directive, and can be given an interpretation based on competition law assessment of what constitutes "economic activity". In practice the difference in interpretation should not be great. If another method for applying section 4 of the PSI Act is selected, the Swedish PSI Act possibly does not cover what should be covered according to the PSI Directive and the effective re-use of this type of information in Sweden would not be assured.

Generally, the method under the PSI Act, as well as under the PSI Directive, is a three-step test for when the rules become applicable:

Firstly, according to section 4 of the PSI Act, the question is whether the initial supply of documents where made within a business activity or not. In general, under Swedish law, the interesting issue would be in what activity the document is originally supplied. If this is not a business activity the PSI Act will become applicable. If the activity in question is both a business activity and a public activity, section 4 should apply. In section 4 of the PSI Act, making use of the principle of supremacy of EU law, the notion of "public task" shall prevail over "business activity".

Secondly, under section 6 of the PSI Act, the question is whether the document will be used for any other purpose other than the initial purpose for which it was supplied, i.e. if the document is re-used. Section 6 does not require that the new purpose must be commercial, or a business activity nor, in fact, that it is a different activity at all. Section 6 only stipulates that the purpose for utilizing the documents must have changed.

Thirdly, according to section 9 of the PSI Act, where the PSB's internal re-use should be scrutinized, the question is whether the activity where the documents are re-used is a business activity. It should be noted that section 9, or, as a matter of fact, the Swedish PSI Act as a whole, does not require that the activity in which documents are to be re-used cannot be a public task. In other words, if the activity in question is both a business activity and a public task, section 9 is applicable. In section 9 of the PSI Act, thus, "business activity" prevails over "public task".

Exclusive rights

There is an interaction between the concepts of licences and exclusive arrangements: exclusive rights are in essence a very specific type of licence agreement. In effect, the interaction between Arts 8, 10 and 11 of the PSI Directive (c.f. sections 8 and 10 of the PSI Act) can be seen as a continuum. Licensing arrangements are encouraged by the PSI Directive, but these too may become so severe in the conditions they impose that they merge into a type of de facto exclusive right by creating a limited, closed class of licensees.

However, where in some cases this may lead to an overlap between their respective provisions, we can also take a look at the features which distinguish Arts 8 and 10 from Art 11 of the Directive (c.f. paras. 8 and 10 of the PSI Act). These centre on four issues relating to the scope, standing, effects and burden of proof.

Contrary to "business activity", the term "exclusive rights" in the PSI Act has been implemented in full accordance with the equivalent term in the PSI Directive. Unfortunately, the PSI Directive remains silent as to the question whether the ban on exclusive rights only catches arrangements between a public sector body and one other contractor or also arrangements that provide rights to more than one (but a limited number) of contractors.

Despite the temptation to interpret the term "exclusive right" in Art 11 of the Directive as equivalent to the identical term contained in Art 106 TFEU (thus limiting the scope to the situation where there is one exclusive right holder), the repercussions of this would be contrary to the aims of the Directive and this narrow approach should be avoided. Any arrangements that restrict possibilities for re-use, whether they concern one third party or more, should therefore be prohibited. The mention of both special and exclusive rights in Art 3 of the Public Procurement Directive supports this broad definition, especially where the European Commission supporting statement makes reference to tender procedures. Given the aim of Art 11 (to remove barriers to re-use) and the surrounding context of the Commission supporting statement, it is likely that tender procedures for the re-use of PSI were intended to be caught by Art 11.

Thus, sections 8 and 10 of the PSI-Act overlap. Nonetheless, section 10 imposes fewer element to be fulfilled compared with section 8 of the PSI Act. Sections 8 and

10 should be considered in parallel, but section 10, interpreted in the light of Art 11 PSI Directive, should be given precedence.

In short, our final observations resulting from this research are that incorporating the PSI Directive into national law is not an easy matter, given the multiple legal planes which this domain touches. The intention of the Swedish legislator was clearly to create a narrow exemption via section 4 of the PSI Act where a PSB acts in its ”business activities.” This term should be interpreted in keeping with the Directive, so as not to include any ”public tasks.” In contrast, ”exclusive rights” should be interpreted broadly. In both cases, it would be beneficial if further guidance were to be issued on the interpretation of these two terms, which may also come through a decision of a Swedish Court or of the SCA.

Lastly, it appears likely that the European Commission will make moves to clarify or amend the PSI Directive in the context of a review in 2012. In such circumstance, the Swedish delegation may want to raise the issues regarding interpretation of these two terms, as well as others, in the context of the negotiations.

1 Introduction

Under the assignment of the Swedish Competition Authority this report[2] aims to clarify the meaning of the terms ”business activity” and ”exclusive right” as they appear in sections 4 and 10 the Swedish PSI Act (PSI Act). These terms have been implemented into the PSI Act with a view to transposing Arts 1(2)(a) and 11 of the European PSI Directive[3].

1.1 Business Activity and Public Task

Firstly, in chapter 3, this study will undertake to clarify the scope of the term ”business activity” as this is crucial for determining whether the PSI framework is to be applied or not. Examining this alongside the PSI Directive allows us to assess whether the Swedish term corresponds to, is broader, or narrower in scope than ”outside public task[4] ”. Given the confusing and at times inconsistent legislative history of the PSI Act, a major element in this assessment will be the intentions of the Swedish legislator. The possible need for reconciliation with the wording and intentions behind the PSI Directive will be followed up with recommendations to ensure that the minimum European standards are met.

1.2 Exclusive Rights

Secondly, in chapter 4, this study sets out to examine the nature of ”exclusive rights” which are in principle prohibited by the PSI Directive and, consequently, the PSI Act. Doing so, it contextualises the 2009 European Commission informal ”supporting statement” (provided in the framework of the PSI exclusive arrangements studies held), which commented on both the scope and nature of such rights[5] . In addition, confusion between ”licensing agreements” (governed by Art 8) and ”exclusive agreements” (subject to Art 11) will be clarified.

1.3 Links to Competition Law

Since the PSI Directive is truly inspired by competition law, the interconnection of these rules are raised in certain contexts and commented on (e.g. the meaning of

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[2]This report has been compiled by Marc de Vries (Citadel Consulting - info@devriesmarc.nl), Björn Lundqvist (Roschier - bjorn.lundqvist@roschier.com) with the assistance of Emma Linklater (Citadel Consulting- emma.linklater@eui.eu) and Liisa Rajala Malmgren (Roschier – liisa.rajalamalmgren@roschier.com).

[3]*Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information* Official Journal L 345 , 31/12/2003 P. 0090 – 0096 (the PSI Directive).

[4]PSI Directive Art 1(2)(a).

[5] Available online at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/other_activities/luis_presentation.pdf.

Art 106 TFEU in relation to exclusive rights), as far as this is essential to understanding the provisions which form the main scope of this assignment. As some elements of this interconnection apply both to chapter 3 and 4, chapter 2 holds a general analysis thereof. In the same chapter a brief introduction to both the PSI Directive as well as the PSI Act (and its implementation history) is given.

1.4 Implementations in Other EU Member States

Furthermore, addressing the questions posed, we have looked into implementations and practices in other Member States to see whether these could serve as sources of inspiration for the interpretation of the terms concerned. In that context, we looked at Denmark, Finland, France, the Netherlands and the UK. These are considered in chapters 2, 3 and 4.

1.5 Final Observations

Finally, in chapter 5 we have allowed ourselves some final observations going beyond the questions posed. They are rather of a practical nature and may serve useful in addressing the implications of our findings.

The document also holds a number of Annexes.

The text of this report has been finalised on 19 september 2011.

2 Introduction to the European and Swedish PSI re-use Rules

Essence: This chapter provides the contours of the main legal frameworks concerned: (1) the PSI Directive; (2) the Swedish implementation thereof; and (3) the main source of inspiration for the PSI Directive: EU competition law. Working through this fundamental groundwork will allow for a more thorough analysis of the terms ”business activity” and ”exclusive right” in the next chapters.

2.1 Brief Introduction to the PSI Directive

In the last decades there has been a significant progression in the way that the public sector deals with information in its possession. In the 1970s and 1980s, the focus was primarily on improving access to public sector information (PSI)[6]. However, in the 1990s with increasing digitalisation and the advent of the Internet also came new opportunities to exploit this information. PSI is now seen as an economic asset[7] with considerable economic potential and which, when exploited, can contribute significantly to the proper functioning of the internal market[8]. Consequently, the European Commission took an interest in this dossier and via the Green Paper on PSI (1998) and a Communication (2001), it initiated the adoption of a European Directive[9]. The final version of this PSI Directive was adopted on 17th November 2003 and was to be implemented by the Member States by 1 July 2005.

The Directive is built around two key pillars of the internal market: transparency and fair competition. It lays down a minimum set of rules to build upon a common legislative framework regulating how public sector bodies (PSBs) should make their PSI available for re-use. The main provisions of the Directive are set out to remove barriers such as (high) prices (Art 6), discriminatory practices (Art 10) and other market restrictions (Art 11).

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[6] De Vries, M., ”*Integrating Europe's PSI re-use rules – demystifying the maze*”, Computer Law & Security Review 27 (2011) pp 68-74 (available at: www.sciencedirect.com)

[7] Idem. See for an overview reports Review of the PSI Directive (Brussels, 7.5.2009 COM(2009) 212 final), pp. 5-8, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0212:FIN:EN:PDF.

[8] The rationale and economic importance of this initiative is explained in detail in the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 23 October 2001, ”*eEurope 2002: creating an EU framework for the exploitation of public sector information*” COM(2001) 607.

[9] See Commission of the European Communities, *Public Sector Information*: A Key Resource for Europe, Green Paper on Public Sector Information in the Information Society, COM (1998) 585, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 23 October 2001, *eEurope 2002: creating an EU framework for the exploitation of public sector information* COM(2001) 607 *and Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents* COM(2002) 207 final.

The PSI Directive has a wide scope and covers any type of re-use by a large spectrum of ”re-users” (commercial or non-commercial, by third parties, or the PSB itself). It does not require Member States to make documents available, as it is left to the MS to determine when there is a right to access and whether it wants to allow re-use. As a minimum harmonisation instrument, the PSI Directive encourages Member States (MS) to go beyond the rules laid down by the Directive. However, the provisions adopted by MS must be at least equal to the scope of the Directive and cannot be more restrictive. The application of the PSI Directive will be examined more fully in the next chapters.

Understanding and applying the PSI Directive is not an easy task. The legal framework surrounding PSI re-use (going beyond the PSI Directive) is very complex due to its transcending nature, which blends four areas of law: freedom of information law, ICT law, intellectual property law and competition law. These areas have been regulated at a European, national and even at a sectoral level, but, of course, in isolation.

In 2009, in accordance with Art 13 of the Directive, the European Commission reviewed the PSI Directive[10] and announced a second review, at the latest in 2012. This review is now underway and has been flagged as a key action area for the Commission in its 2011 Work Programme[11] and as part of the Digital Agenda for Europe[12].

The online stakeholder consultation was initiated in this context in 2010. It indicated that, amongst other things, more guidance was needed from the Commission with regards to the terminology of the Directive. There were calls for legislative amendments or soft law instruments to define certain parts of the Directive more clearly, especially concerning the public task, charging, data and licensing conditions[13]. The main findings of this consultation will feed into the full review of the Directive. Although still unclear, it appears to be likely that the Commission will undertake efforts to make amendments to the PSI Directive. A political decision thereon is expected in the autumn of 2011.

2.2 Brief Introduction to the Swedish PSI Act

In Sweden, PSI has historically been viewed from a democratic constitutional viewpoint relating to rights of access rather than as a source for creating economic wealth. Nonetheless, markets for public information have existed based on the right to public access to public information, even though the PSI input to these markets

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[10] See, Press Release, *Digital Agenda: Commission consults on re-use of public sector data*, IP/10/1103, Brussels, 9 September 2010.

[11] See, *Letter by President Barroso to the Members of the European Parliament*, MEMO/10/393, Brussels, 7 September 2010.

[12] See, http://ec.europa.eu/information_society/digital-agenda/index_en.htm.

[13] *Review of the PSI Directive* : Executive summary, p.1.

has not generally been regulated under a framework. The Swedish government, based on the regulations for public access, informed the European Commission on the 27 June 2005 that the Directive in the government's opinion was fully implemented into Swedish law through existing national regulations. However, the European Commission questioned the Swedish implementation and claimed in a letter of formal notice dated 23 March 2007 that Sweden had failed to introduce regulation and take other action, or failed to adjust the existing regulation in view of the PSI Directive. The Commission also argued that Sweden had retained management and contractual practices which were contrary to the Directive. The Commission therefore concluded that Sweden had failed to fulfil its obligations under the Directive. This mainly regarded the implementation of its Arts 2, 4, 6, 7, 8 and 10.

The Swedish government then decided to partially implement the Directive by the Ordinance (2008:31) concerning conditions of re-use of information from government agencies. However, this regulation only applied to government agencies.

The Commission claimed in a supplementary letter of formal notice dated 17 October 2008, that the Swedish implementation was incomplete and incorrect, particularly concerning Arts 2, 3, 4, 5, 6, 7, 8, 10 and 11 of the PSI Directive. The lack of specificity, precision and unquestionable binding force could not guarantee that either the objectives or the duties imposed by the PSI Directive were met in a complete and satisfactory manner.

To ensure proper implementation of the Directive into Swedish law, the Swedish government therefore appointed a group within the government offices of Sweden to investigate how a proper implementation of the Directive could be ensured. Part of the assignment was to propose a new law and necessary amendments to existing laws and regulations. The final report was submitted on 30 June 2009.[14] The report later resulted in the Swedish Act (2010:566) on the re-use of documents from the public sector (the Swedish PSI-Act). The Act entered into force 1 July 2010.

In spite of all these efforts, uncertainties remain where stakeholders (e.g. the SCA, government agencies and the municipalities) seem to have different opinions as to the interpretation of certain terms in the Swedish PSI Act.

A mapping of the use of ”exclusive rights” in Sweden made by the Swedish Agency for Public Management (Swe Statskontoret) in 2010 shows that PSBs have different opinions on how to interpret the term ”exclusive right”. Thus, the interpretation is not merely of theoretical interest, but also a dilemma in practice, inhibiting the re-use of PSI.[15] Furthermore, the SCA is currently investigating PSBs use and re-use of

[14] Reg. Fi2009/4998.

[15] Kartläggning av exklusiva rätter 2010:21, Statskontoret.

PSI under the Swedish Competition Act which have different opinions of the interpretation of ”business activity” and ”outside public task”.

2.3 Connection between the PSI re-use Rules and Competition Law

Although not the focus of this study, we will often rely on competition law when interpreting the terms ”business activity” (and ”public task”) and ”exclusive rights” in chapters 3 and 4 respectively. Below we briefly describe the ”layer” of common ground of competition law that applies to both topics.

As mentioned above, the PSI Directive connects to different areas of law, competition law in particular. This can be seen clearly in Arts 8 (on licensing), 10 (on non-discrimination) and 11 (on exclusive arrangements). The recitals to the Directive also illustrate that competition law is a fundamental driver for the PSI Directive, as highlighted in recitals 1, 9, 20, 25 of the preamble. Hence, the goals of the PSI Directive fully complement those which competition law sets out to achieve. Most prominently, opening up PSI for re-use and maximising its full economic potential, PSI will contribute to European market integration. Competition law therefore acts as the ”yardstick [16]” by which we can assess the implementation, application and effectiveness of the PSI rules, as well as being a fall back to regulate the behaviour of PSBs (possibly together with private sector players) acting on the market. Furthermore, where the PSI Directive is silent when it comes to sanctions for behaviour that infringes its principles, the application of general competition law brings national (and potentially European) competition authorities into the picture[17]. It is clear from recital 20 that this enforcement of competition law is to be very much encouraged[18].

With the economic aims of the Directive, and given that competition law can apply to public sector bodies when they participate in economic activities, it is clear that there will be a degree of overlap between the provisions of the PSI Directive and competition law. At the same time, the Directive ”extends” the application of competition law principles to PSBs as quasi-sectoral competition rules. It imposes certain obligations going beyond the general rules (e.g. transparency, maximum tariffs for re-use of PSI, non-discrimination) supporting re-users.

Since the interaction is rather complicated to put into words, to start off with the following scheme outlines when and where competition law interacts with the PSI Directive. Obviously, as this is the case with models, the scheme simplifies the matter to some extent, however, for the context and aim of this study serves the purpose of showing the basic interaction. The parts in blue, concerning the

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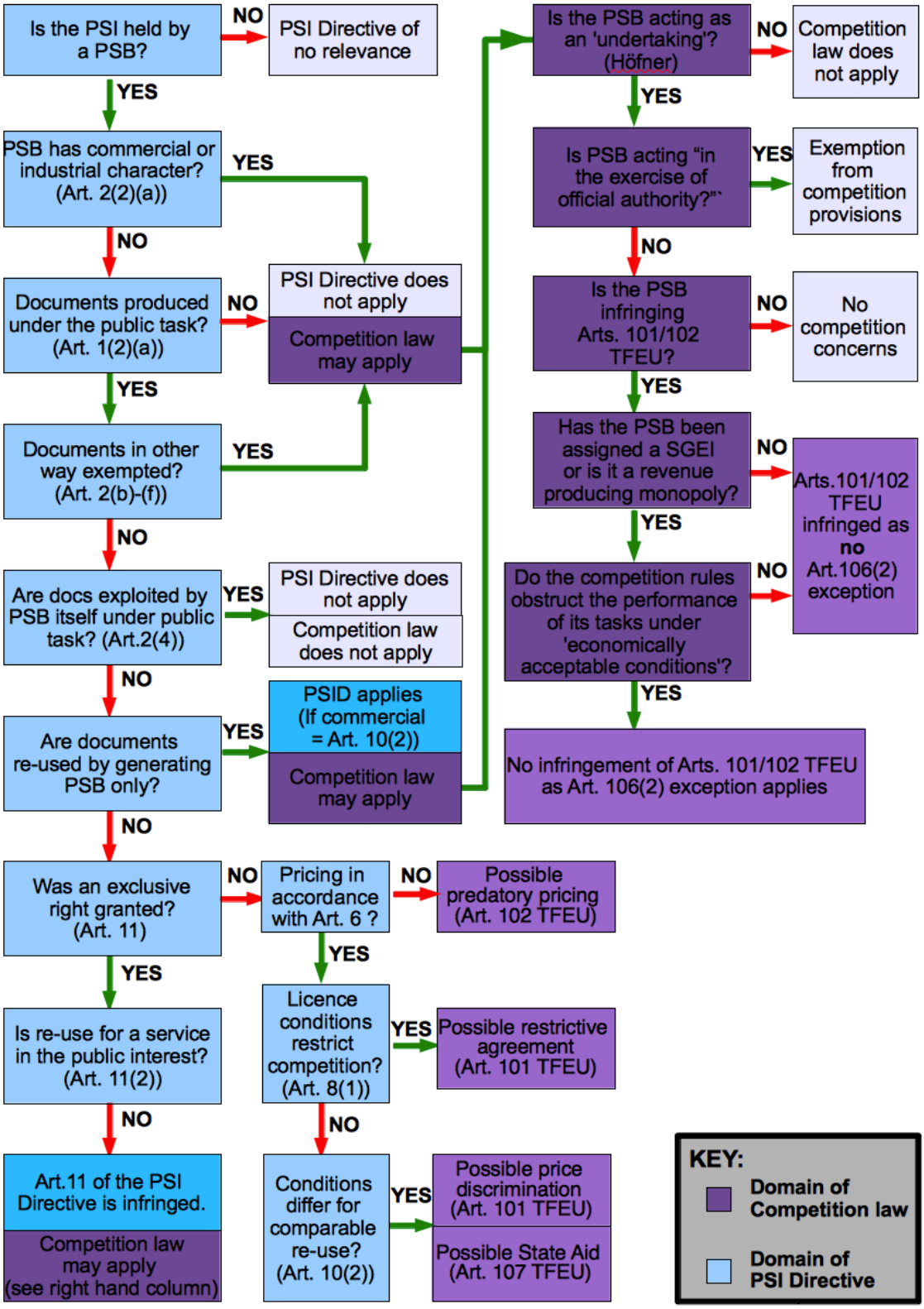
[16] Drexl , J, not yet for citation.

[17] National competition authorities and the competition rules of individual MS will come into play when there is no ”effect on trade between Member States.”

[18] Recital 20 reads: ”*Public sector bodies should respect competition rules when establishing the principles for re-use of documents…*”

applicability of the PSI Directive, will be considered in more detail in chapters 3.3 (when the PSI Directive applies) and 4 (clarifying ”exclusive rights”). The parts in purple relate to competition law and will be discussed below.

2.4 The Public Task, Competition Law, and the Application of the PSI Directive



Competition law applies to situations where a PSB is acting commercially, possibly in competition with other market players. Unlike the PSI Directive, its application is not dependent on whether or not the PSB is carrying out a public task. In contrast, only entities engaging in an economic activity (acting as "undertakings") can be caught by the competition rules. This is an important difference between the competition rules and the PSI Directive: while certain behaviour may infringe the competition law principles found within as well as outside the PSI Directive, the Directive casts a broader net since it can catch situations which are not "economic" in nature.

It can be seen clearly from the scheme above that competition law only kicks in where the PSB is acting as an "undertaking," as defined in the *Höfner* judgment of the ECJ[19]. The concept of an "undertaking" encompasses "every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed[20]." The European courts have taken a functional approach when deciding whether or not an activity is "economic" by looking at the nature, aim and financing arrangements. The fact that the entity concerned is a PSB, established under public law, does not mean that it escapes the application of the competition provisions. The characteristic features of "economic activities" are the offering of goods or services on the market, in situations where the activities could be carried out commercially by private undertakings[21]. It is irrelevant whether or not the PSB seeks to make a profit with its activities.

However, acting as an "undertaking" and acting within the "public task" are not wholly diverging principles. There can be a degree of overlap between "commercial activities" and "public task activities." On this basis, it is possible for a PSB to be subject to both competition law and the PSI Directive at the same time. This is true in the case of the UK trading funds, examined as case examples below. Nevertheless, on various occasions, the European courts have recognised that it is essential to provide a balance between the application of the competition provisions and the need to carry out public tasks[22]. On this basis, a very limited exemption from the application of competition law has been developed by the European Courts whereby a PSB does not act as an undertaking when it is acting in the "exercise of its official authority[23]". In such cases, it has been found that the exercise of tasks of a public or social nature warrant an exclusion from competition policy altogether. The "exercise of official authority" exemption, applies where an activity

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[19] C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306.

[20] C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306, at para. 21.

[21] Jones, A,, and Sufrin, B., *EC Competition Law (Oxford*, OUP, 2007) p.128-129. (if an activity is capable of being carried out by a private entity, it will usually be of an economic nature and therefore subject to competition rules). Ex Hofner, Diego Cali, Eurocontrol cases.

[22] ECJ, Case C-205/03 P, *FENIN v. Commission*, 11 July 2006, Maduro AG, para. 26, *European Court Reports* 2006, I-6295.

[23] The "exercise of official authority" exemption, applies where an activity is "*a task in the public interest which forms part of the essential functions of the State*" and where the activity "*is connected by its nature, its aim and the rules to which it is subject with the exercise of powers […] which are typically those of a public authority*." Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* (SEPG) ECR [1997] ECR I-01547.

is "a task in the public interest which forms part of the essential functions of the State" and where the activity "is connected by its nature, its aim and the rules to which it is subject with the exercise of powers […] which are typically those of a public authority. [24]"

However, it is important to note that the application of this exemption from the competition provisions is very limited, with the European Courts in the majority of cases finding instead that an authority is acting as an undertaking. Where this is the case, as the scheme above shows, an exception from the competition provisions may still be possible via Art 106(2). This reads as follows:

"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."

Art 106(2) therefore provides for the non-application of the competition rules in situations where a PSB is providing a service in the general economic interest (SGEI) or is a revenue-producing monopoly, and as such it has the effect of providing a balance between competition law and the public interest. However, this exception is also to be interpreted strictly[25] and will only be granted where it is proportionate and justified, in order to allow the performance of assigned tasks under "economically acceptable conditions[26]".

With regards to the terminology of Art 106, there is some overlap with the wording of the PSI Directive which will be discussed more fully in Chapter 4. In short, SGEI are services that take place on the market, but due to their special nature, are not subject to the full force of competition rules[27]. The "general interest" covers situations where a PSB steps in to provide services where they would not otherwise be offered by the private sector[28]. Often this will be because of a market failure,

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[24] The "exercise of official authority" exemption, applies where an activity is "*a task in the public interest which forms part of the essential functions of the State*" and where the activity "*is connected by its nature, its aim and the rules to which it is subject with the exercise of powers […] which are typically those of a public authority*." Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* (SEPG) ECR [1997] ECR I-01547. See further Janssen, K., *The EC Legal Framework for the Availability of Public Sector Spatial Data: An examination of the criteria for applying the directive on access to environmental information, the PSI directive and the INSPIRE directive* (Aalphen aan den Rijn, Kluwer Law International, 2010), at p. 354.

[25] C-157/94 *Commission v Netherlands*, para. 51.

[26] This "proportionality test" does not however go so far as having to show that the survival of the body would be jeopardised were the rules to be applied; see C-157/94 Commission v Netherlands, para. 43 and Case C-475/99, *Ambulanz Glockner v. Landkreis* [2001] ECR I-8089 paras. 57-58.

[27] Unlike the "public task" which is left to Member States to decide, the European courts have held that services of general economic interest are a community concept and so should be interpreted uniformly; see Case 10/71, *Ministère public luxembourgeois v Madeleine Muller and others*, 14 July 1971, paragraph 14-15, *European Court reports* 1971, 723.

[28] The "general interest" covers"*the tasks [that] need to be undertaken in the public interest but might not be undertaken, usually for economic reasons, if the service were to be left to the private sector* " as per the Opinion of A-G Jacobs at para.

which means that the public body has to step in to provide the service itself[29]. Where a market failure has occurred and a PSB steps in to distribute the PSI which would otherwise not be available, this is a strong indicator that the body is acting within its public task[30].

Despite the provisions of the PSI Act aiming to protect competition on the market, case law and investigations by national competition authorities show that anticompetitive practices are still undertaken by PSBs holding PSI. As the monopoly holders of this information, they are in a position of strength on the market and they may use this to their competitive advantage. PSBs may prevent access to PSI by charging excessive prices[31], or may refuse to supply other re-users with the information they require as inputs for their business, thereby forcing them from the market[32]. They might also use their position as holders of the PSI to their commercial advantage by charging less for their own re-use of PSI[33].

To demonstrate how competition law and the PSI domain interact in practice, the following provide interesting examples of the nature and variety of issues which might arise:

Case Example: ECOMET (BE)

ECOMET is an association which was set up under Belgian law to "preserve the free and unrestricted exchange of meteorological information between the National Meteorological Services for their operational functions within the framework of WMO regulations and to ensure the widest availability of basic meteorological data and products for commercial applications[34]."

The European Commission raised concerns that Art 101 TFEU could be infringed, since the objective of the association was to facilitate exchange of information and there was potential for an effect on trade between MS since the membership came from throughout the Union.

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105 in C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, 25 June 1998, *European Court reports* 1998, I-4075.

[29] See further section 3.5.3 for rules of thumb as to what may be in the "public task." Janssen, K., *The EC Legal Framework for the Availability of Public Sector Spatial Data: An examination of the criteria for applying the directive on access to environmental information, the PSI directive and the INSPIRE directive* (Aalphen aan den Rijn, Kluwer Law International, 2010) at p. 387 referring to Sauter, W., *Services of general economic interest and universal service obligations as an EU law framework for curative health care, TILEC Discussion Paper*, 2007, 18, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013261.

[30] See section 3.5.2 for other such indicators which may act as "rules of thumb."

[31] Prohibited by Art 102(a) TFEU.

[32] Prohibited by Art 102(b) TFEU.

[33] Such situations are explicitly prohibited by the PSI Directive Art 10(2), which finds its basis in Art 102(c) of the TFEU.

[34] ECOMET, "*The Concept of ECOMET*", retrieved from http://www.ecomet.eu/description.htm#concept.

The Commission also became concerned that the grouping of undertakings forming the association could form a dominant position on the market and infringe Art 102[35].

Given the market context, the strength of its membership increased the likelihood of such a dominant position occurring. However, the mere existence of such a dominant position is not enough to create an infringement of competition law; there must also be abuse of this position.

After four years of negotiation, a comfort letter was issued by the Commission to exempt ECOMET from the competition provisions. The Commission was satisfied that the rules under which the association functioned ensured equal treatment in order to guarantee fair competition with independent service providers/ In particular, it noted that ECOMET rules require the national meteorological institutes to keep separate accounts to analyse their commercial activities, which ensures there is no cross-subsidisation[36].

Case Example: Ordnance Survey (UK)

Ordnance Survey was founded in 1791 as the UK's National Mapping Agency[37]. In 1999, it took the form of a UK Trading Fund. As such, it works under a cost recovery system; part of its public task is therefore to commercialise the information which it holds in order to generate income.[38] It has to make a profit by supplying the information it holds.

On this basis, Ordnance Survey is required to act commercially within its public sector task. This opens up clear opportunities to abuse its dominant position as a PSI holder by refusing to supply market competitors.

Ordnance Survey was seen to be concentrating on developing its own refined information products and limiting the access which potential competitors could have to this information.

Additionally, the licence exception policy of the organisation laid down that it could refuse applications "to market a product whose intended use is the same as,

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[35] Concerns were raised that the association could form "*a position of economic strength… which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors*. See also Eurogeographics: Provider of public sector spatial data associated under French law to represent the National Mapping and Cadastral Agencies in 43 different countries.

[36] See European Commission "*The Commission Authorises joint meteorological products by Ecomet sale*" IP/99/781 Brussels, 21 October 1999. Association of Environmental Data Users in Europe, "*Comfort Letter on the joint sale of meteorological products by ECOMET. Comments*", 1999, http://www.primet.org/index.php?Itemid=29&id=81&option=com_content&task=view.

[37] www.ordnancesurvey.gov.uk.

[38] Part of the public task of UK trading funds is cost recoupment through participation in commercial activities. For a full explanation of UK trading funds see HM Treasury, *Guide to the Establishment and Operation of Trading Funds, available at http://www.hm-treasury.gov.uk/d/Guide_to_the_Establishment_and_Operation_of_Trading_Funds.pdf.*

or comparable to, that of any product marketed by Ordnance Survey itself or any product which Ordnance survey intends to market. [39]"

Although by the time of the OFT investigation this provision had been removed in writing, there had apparently been no change in policy. While the approach of Ordnance Survey is based on ECJ rulings on licensing, from a competition point of view the OFT was clearly vying for a more flexible approach which would be in keeping with the UK government and European policies to increase access to PSI for commercial re-use[40].

In the context of this investigation, the OFT and Communities and Local Government Committee recommended that the public tasks and (non-public) commercial activities of Ordnance Survey be subject to separate accounting. However, as yet, as decision on what is within the public task of Ordnance Survey has not been taken by the UK government[41].

Case example: Direction de la Météorologie Nationale (FR)

Direction de la Météorologie National was a monopolist for aeronautic data in France. It refused to give potential re-users access based, on concerns about "security and the risks that such dissemination would cause aerial traffic.[42]"

At first, these security concerns were accepted by the French competition authority as justifying a refusal to supply the information[43].

However, the Court of Appeal disagreed, instead finding an abuse of the dominant position held by the PSB[44].

Nevertheless, the highest French court, the Cour de Cassation, took a different approach[45]. It held that neither the delivery of data, nor the dissemination of information to the public were economic activities. Instead, it said that these were in the public service and so competition law did not apply.

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[39] OFFICE OF FAIR TRADING, *The commercial use of public information (CUPI),* 2006, 137, retrieved from http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft861.pdf.

[40] Janssen, K., *The EC Legal Framework for the Availability of Public Sector Spatial Data: An examination of the criteria for applying the directive on access to environmental information, the PSI directive and the INSPIRE directive* (Aalphen aan den Rijn, Kluwer Law International, 2010) at p.369.

[41] http://www.epsiplus.net/news/news/ordnance_survey_public_task.

[42] Janssen, K., *The EC Legal Framework for the Availability of Public Sector Spatial Data: An examination of the criteria for applying the directive on access to environmental information, the PSI directive and the INSPIRE directive* (Aalphen aan den Rijn, Kluwer Law International, 2010) at p.369.

[43] Cons. Conc. Déc. No 92-D-35, 13 May 1992 relative à une saisine de la Société du journal téléphoné à l"encontre de la direction de la météorologie nationale, BOCCRF no. 13, 4 July 1992, 224.

[44] Cour D"Appel Paris, *Société du journal téléphoné v. Ministère de l"équipement, Direction de la météorologie nationale*, 18 March 1993, BOCCRF no. 6, 26 March 1993, 110.

[45] Cour de Cassation, *Ministère de l"équipement, Direction de la météorologie nationale v. Société du journal téléphoné*, 12 December 1995, Bull. Civ. IV, no. 301, 276.

This case not only highlights the conflict and narrow dividing line between activities in the public task and those which are ”on the market”, but also demonstrates that the consequences of finding activities in the ”public task” can effectively be to limit other entities from accessing an entire market.

Application of Swedish Competition Law

The corresponding Swedish competition regulations[46] may come into play where there is no effect on inter-member state trade. Furthermore, the specific Swedish rules for sales activities carried out by public entities in competition with private undertakings stipulated in chapter 3 section 27 of the Swedish Competition Act (SFS 2008:579) may, for example, be applicable.

In order to address the competition issues that arise when the public sector competes with private undertakings on the open market, the Swedish Government recently amended the Swedish Competition Act, with specific competition rules addressing this issue. According to the new sections, the Stockholm District Court may prohibit certain conduct, in the context of offering goods or services, by a municipality, county council, state or companies controlled by either of these bodies; or an activity, consisting of offering goods or services, from being carried out by municipalities, county councils or companies controlled by either of these bodies. If the conduct or activity (i) distorts, by object or effect, the conditions for effective competition on the market; or (ii) impedes, by object or effect, such competition from occurring or developing, it may be prohibited. The prohibitions can be issued by the Stockholm District Court through an injunction, further to an application by the SCA. Conduct that is found to be justifiable on public interest grounds and activities, which are compatible with law, may not be prohibited. The rule for sales activities carried on by public entities in competition with private undertakings has applied from 1st January 2010. This means that the SCA has recourse to Stockholm City Court in order to request the prohibition of sales activities by public entities that are considered to distort or impede competition.

The interplay between this rule and the Swedish PSI Act has not yet been fully investigated by the SCA and the courts. Nonetheless, a public sector body which infringe the Swedish PSI Act when re-using documents may, if the requirements are fulfilled, be violating the specific rule regarding sales activities carried out by public entities stipulated in the Swedish Competition Act. The Swedish Competition Act in general, and chapter 3 section 27 of the Act specifically, may thus become an enforcement mechanism of the PSI Act.

[46] See for example SCA decision from 8 October 1999, Dnr 520/96, Basun.

3 Interpreting the term ”Business Activity” and ”Public Task”

Essence: this chapter addresses the lack of clarity concerning the Swedish implementation of the PSI Directive through the term ”business activity”. It compares and analyses the differences between the term ”public task” and the term ”business activity”, mainly looking at the intentions of the legislators, and, subsequently, assesses the impact of the choices made by the Swedish legislator.

3.1 Introduction

Difficulties have arisen in determining the scope of the PSI Act due to the difference in terminology between the PSI Directive and the Swedish PSI Act. The Swedish legislator did not utilise the term ”public task”, which appears in the PSI Directive, but instead the term ”business activity”. This might cause problems: PSBs may be uncertain about the limits of their obligations under the PSI Directive and re-users will be in doubt whether the possibilities provided by the PSI Directive is applicable to them in Sweden. As a consequence re-use potential captured in Swedish PSI may remain unexploited, in theory affecting economic growth and employment opportunities. Therefore, addressing this issue is of importance to Swedish PSI stakeholders.

Given the importance of this issue, section 3.2 of this chapter will set out the main provisions of the PSI Directive and the SE PSI Act, making the implementation issues explicit. Then the working of the PSI Directive in practice, as well as guidance on its main provisions, will be developed in section 3.3. Section 3.4 will look into the implementation in Sweden in further detail. This will set out why the term ”business activity” was used instead of referring to the ”public task”, and will accordingly assess the choices made by the Swedish legislator when implementing this part of the Directive. It is by gaining this understanding of the legislator’s intentions that we then move to sections 3.5 and 3.6, which allows for comparisons to be made between the Swedish and European provisions. The conclusion is that by utilizing “business activity”, the Swedish legislator runs a serious risk that the PSI Act will not adequately transpose and incorporate the PSI Directive. The chapter is finalized in section 3.7, where possible solutions and recommendations as to how to clarify remedy the inconsistencies between the PSI Act and the PSI Directive. This section further includes the provision of some concrete tools: general rules of thumb which can be applied to better understand when an activity is likely to be caught by the PSI re-use rules.

3.2 The relevant Provisions of the PSI Directive and the Swedish PSI Act

In implementing the SE PSI Act, the Swedish legislator selected another terminology than can be found in the original PSI Directive. This can be displayed in the following transposition table:

PSI Directive		**Swedish PSI Act**	
Swedish version	*English version*	*English translation*	*Swedish text*
Detta direktiv skall inte tillämpas på… handlingar vars tillhandahållande **inte omfattas av den offentliga verksamhet** som bedrivs av de berörda offentliga myndigheterna.	Art 1(2)(a): The **Directive** does not apply to… Documents the supply of which is an activity falling **outside the scope of the public task** of the PSBs concerned.	Section 4(2)(2): The **Act** does not apply to… Documents provided by a PSB **in its business activity**.	Lagen gäller inte… handlingar som en myndighet tillhandahåller **i sin affärsverksamhet**.
Utbyte av handlingar mellan offentliga myndigheter som enbart sker i samband med deras offentliga verksamhet skall inte anses utgöra vidareutnyttjande.	Art 2(4): The **Directive** does not apply to… The **exchange of documents between PSBs purely in pursuit of their public tasks** (this does not constitute ”re-use”).	Section 4(2)(1) The **Act** does not apply to… Documents that a **PSB provides to another PSB, except** where it is indicated these documents are to be **used in its business activity**.	Lagen gäller inte… Handlingar som **en myndighet** tillhandahåller en annan myndighet, utom när det framgår att handlingarna ska **användas i affärsverksamhet**.
vidareutnyttjande: personers eller rättssubjekts användning av handlingar som finns hos offentliga myndigheter **för andra kommersiella eller icke-kommersiella ändamål** än det ursprungliga ändamål för vilket handlingarna framställdes **inom den offentliga verksamheten**.	Art 2(4): Re-use is when… Documents held by PSBs are used for **commercial or non-commercial purposes outside of the initial purpose within the public task** for which the document was produced.	Re-use is... The use of documents for **other purposes than the initial purpose** for which the documents are being treated by a PSB.	I lagen avses med vidareutnyttjande användning av handlingar **för andra ändamål än det ursprungliga ändamål för vilket handlingarna behandlas** av en myndighet.
Om handlingar vidareutnyttjas av en offentlig myndighet som utgångsmaterial för dess **kommersiella verksamhet, som inte ryms inom**	Art 10(2): Non-discrimination principle… If documents are re-used by a PSB as input for its **commercial activities which**	If a PSB re-use documents **in its business activity** the same charges and other conditions for provision of documents shall apply to this activity as it would to others who re-use	Om en myndighet vidareutnyttjar handlingar **i sin affärsverksamhet** ska samma avgifter och andra villkor för tillhandahållande av handlingarna

PSI Directive		**Swedish PSI Act**	
Swedish version	*English version*	*English translation*	*Swedish text*
myndighetens offentliga verksamhet, skall samma avgifter och andra villkor för tillhandahållande av handlingarna tillämpas för den verksamheten som för andra användare.	**fall outside the scope of its public tasks**, the PSB must apply the same charges and other conditions to itself as it would to other users.	documents.	tillämpas för denna verksamhet som för andra som vidareutnyttjar handlingar.

To better understand the discrepancies between the PSI Directive and the Swedish implementation, we will first go through the relevant provisions of the Directive in detail.

3.3 Understanding the Term ”Public Task” in the PSI Directive

3.3.1 The Notion of Second Use is in the Core of the PSI Directive

The basic idea behind the PSI Directive is that we are wasting a lot of economic potential if we disallow PSI from having a ”second” use.

> An example hereof is the content produced by courts. Judges do not produce court decisions compilations (i.e. case law books or specific case law databases) - this is not their public task. Their main role (public task) is to address conflicts between parties. The production of binding decisions is an instrument to perform this public task. Interestingly, these decisions have a value for other parties than those involved in the conflict, such as attorneys and academics. In other words: there is case for allowing another, ”secondary” use of these court decisions to produce case law collections. This ”secondary” use is what the PSI Directive calls ”re-use.” If the court allows this ”secondary” use of these decisions, possibly under a licence (Art 8 of the PSI Directive), this will constitute ”re-use” in the meaning of the PSI Directive. This re-use can be performed by market parties such as publishers picking up and selecting these decisions, adding value to them and selling them on to law firms, ministries etc. Alternatively, the (commercial arm of the) court itself may undertake similar activities. These would then typically fall outside the public task of the court; as a consequence, Art 10(2) of the PSI Directive would apply.

More examples where the PSI Directive may alter the way PSI is utilised would, of course, relate to the large databases connected to, e.g. the Cadastre (swe. Lantmäteriet) or the Companies Registration Office (swe: Bolagsverket), where these databases are fed PSI under a public task of the relevant PSB. This PSI is

therefore used for and in the PSBs public tasks, but is also re-used for commercial purposes.

3.3.2 Public Task is the Demarcation Line for Applicability

Thus, the starting point of the PSI Directive is the notion that PSBs have been established to perform one or more tasks: the public tasks. This is the raison d"être for the public sector. These tasks are normally laid down in formal laws (like the Law on the Cadastre, or the Law on the National Meteorological Institute) or Governmental Instructions. In the process of performing those tasks – the public tasks – the PSBs accordingly "collect, produce, reproduce, and disseminate documents[47]." This is the PSI the Directive wants to catch: it wants to apply to the PSI that is produced "anyway", whereby the public task is in fact the demarcation line for application. Accordingly, Art 1(2)(a) says:

> "This Directive shall not apply to:
>
> (a) documents the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned as defined by 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."

Interestingly, the Directive does not say what is inside the area of application, but rather what is not: for that a national law or common administrative practice needs to say so. Put differently, unless such law or practice exists there is an assumption that the documents are created under a public task and are accordingly caught by the Directive. In practice, where almost all activities of the PSB will be undertaken under the mandate of a public task, depending on the national legislation, the documents created in that process will fall under the scope of the Directive, establishing a wide application.

An example of documents produced by PSBs but not caught by the Directive: suppose the national statistical office (a PSB) would have a commercial arm that provides consultancy services in the market. If those consultancy services would be undertaken **without a public mandate**, the documents produced in that context, would NOT fall under the scope of the Directive. However, the raw materials the consultancy services may be based on – the national statistics that are generated under the public task – would of course fall under the Directive.

3.3.3 PSI Directive Does not Define the Public Task

Trying to establish what the public task entails as to the creation of documents, the PSI Directive does not help a great deal: it mentions the "public task" no less than

[47] Recital 8 explicitly connects the performance of the public task to the creation and processing of documents: Public sector bodies collect, produce, reproduce and disseminate documents to fulfil their public tasks.

eight times in its Articles and preamble, yet contains no definition. In fact, the EU legislator explicitly refused to provide such, despite numerous requests for further clarifications, particularly by the Council. In the preparatory works the EC made it clear that this will be down to the Member States.

> "The scope of the public task of a public sector body will often be defined by law or by other binding rules in the Member States. In the absence of such rules it should be defined in line with common administrative practice in the Member State in question. This directive does not seek to harmonize the scope of the public tasks assigned by Member States[48]."

3.3.4 Creation of PSI Under Public Task Does not Create Obligations for Re-use

So, it is down to national rules and practices to establish whether PSI was created under a public task. Furthermore, once we have established that a document has been produced under the public task, the PSI Directive applies (provided the other exemptions (Art 1(2) (b-f) do not apply). However, this does not impose any obligations on the PSBs yet: it is up to them to decide whether they allow for re-use, although the PSI Directive strongly encourages PSBs to open up the information they hold[49].

When considering this decision, a PSB will first of all assess whether there is a right of access, or any other rule that would prevent them from opening up the PSI (including those provided for under the 1(2)(b-f) of the PSI Directive). However, even if no rules prevent PSBs from allowing re-use – or in fact even if the PSB is under the obligation to provide access to the documents – it can still withhold authorisation to copy the re-used PSI if it can invoke its intellectual property rights (like copyrights or, typically applying to large PSI databases, its sui generis rights). This would diminish the value of PSI for third parties. However, this is another matter that is outside the scope of this study.

3.3.5 Re-use is Any Use Except Public Task Use

If the PSB allows for this "secondary use", this is called re-use. Art 2(4) provides that:

> ""re-use" means the use by persons or legal entities of documents held by public sector bodies, for commercial or non- commercial purposes **other than the initial purpose within the public task for which the documents were produced.** Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use."

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[48] Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents COM(2002) 207 final, p. 8.

[49] Recital 9. See also Section 2 above on the aims of the PSI Directive.

Re-use is therefore any use other than the initial purpose within the public task for which the information was collected, produced, reproduced or disseminated (etc)[50]. Thus, the PSI Directive uses a broad definition of re-use covering basically any subsequent activity with the data, provided the purpose of this re-use is different from the initial purpose.

3.3.6 ”Second” Use by PSB is Also Re-use

This re-use does not necessarily need to be performed by private sector parties. PSBs can also re-use themselves. This is typically the case when a commercial arm of the PSB – which is not necessarily a separate legal entity – picks up the PSI from the colleagues at the other end of the corridor and sells it off on the market.

> In the example of the court cases above, the court may decide to allow others to re-use the judgments (that it produced under its public task). In such situations, the court may provide the judgments to others for free, or for a fee.[51] Equally, the court may decide that it wants to re-use the judgments itself. When re-using the judgments itself, it may add value by compiling them or by drafting summaries. So, in essence, any activity of the court going beyond the production of the judgment and the provision thereof to the parties in conflict, establishes re-use, in particular (but not necessarily) when it commercially exploits the court cases (and their added value) by publishing them.

Where a PSB does re-use its own PSI commercially, it is subject to Art 10(2) of the PSI Directive and must take care not to discriminate against other re-users in its charging policy or re-use conditions. Art 10(2) of the PSI Directive lays down the following:

> “If documents are **re-used** by a public sector body as input for its **commercial activities which fall outside the scope of its public tasks,** the same charges and other conditions shall apply to the supply of the documents for those activities as apply to other users.”

Art 10(2) of the PSI Directive thus states that a PSB must use the same terms and conditions on itself as well as third parties when re-using PSI documents as an input to: (i) commercial activities that (ii) fall outside the scope of public task. If the PSI documents are used as an in input to commercial activities inside its public task, Art 10(2) is not applicable.

Obviously, this is in perfect line with rules of competition law: the PSB re-using outside the public task should not be in any better position than a third (market) party looking to re-use that same PSI. Accordingly, the PSI Directive instantly

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[50] Art 2(4) and recital 8.

[51] This must be within the boundaries of the PSI Directive; see Art 6 which lays down principles governing charging.

creates a level playing field between PSBs and other re-users: as soon as the PSBs leaves the public task soil, it loses its ”competition law principles immunity” and Art 10(2) kicks in (next to Arts 101, 102, (possibly through 106) and 107 TFEU, see paragraph 2.3 above).

3.3.7 The Contours of the Public Task and Own Re-Use by the PSB

So far, we have established that the creation of PSI will often be done under a public task and, where it concerns re-use by the PSB there is a demarcation line (inside vs outside the public task). We have also addressed the legal consequences of crossing that demarcation line. However, we have not yet solved the issue where this demarcation line is located. To put it differently: where re-use by the PSB is concerned, what constitutes the public task and where does this task end? Here recital 9 provides some guidance:

> “To avoid cross-subsidies, re-use should include further use of documents within the organisation itself for activities falling outside the scope of its public tasks. Activities falling outside the public task will typically include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market.”

Accordingly, this recital gives us a set of clues as to elements to consider in the assessment of the scope of the public task and sets out an example of supply which would normally be outside the public task. From recital 9 we ascertain:

1. First and foremost that the clues therein are connected to the situation where a PSB exploits its PSI itself (”further use within the organisation itself”), since recital 9 explicitly refers to ”cross-subsidies”, a situation that Art 10(2) aims to address.

2. Secondly, to be typically outside the public task the supply of PSI should be characterised as being”produced and charged exclusively on a commercial basis and in competition with others in the market”, meaning that the behaviour of the PSB needs to be economically driven and the PSI is an economic good that is (or could be) sold on a market.

If these elements are there, this behaviour would typically be outside the public task of the PSB: they provide strong evidence as to the character of the activities.

Obviously, this assessment may be complicated if national laws explicitly mandate the PSB to undertake commercial activities. In the last decennium quite a few PSBs have incorporated such provisions as statutory tasks. Accordingly, they argue that Art 10(2) does not apply to such activities, as they are undertaken within the public task. This is an issue of ongoing debate between PSBs and re-users and has been the subject of court cases as demonstrated in section 2.3. In this context, an important decision is currently being awaited by the ECJ in response to a reference for

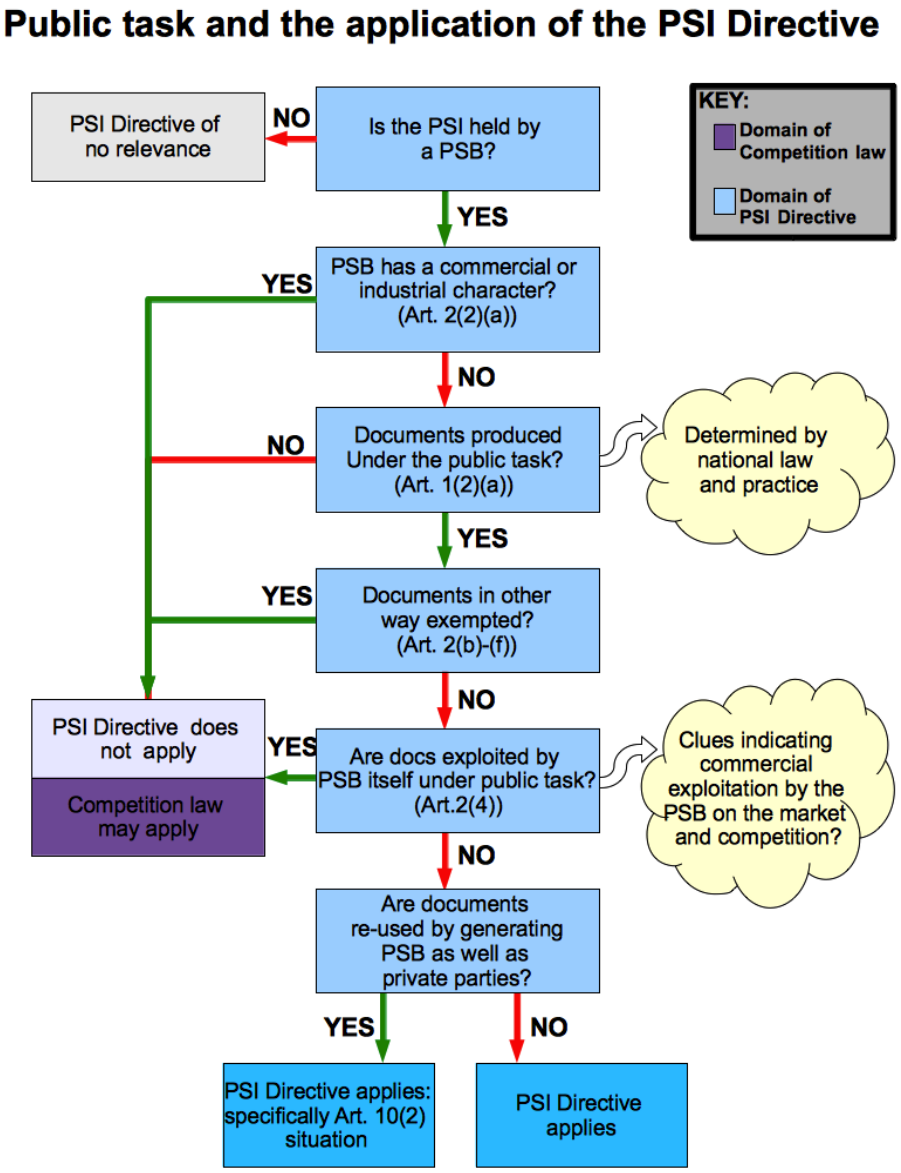
preliminary ruling by the Austrian Supreme Court[52]. It has essentially asked the ECJ to indicate the demarcation line (if there is one) between the "public task" and activities where a PSB acts as an "undertaking" and was raised in the context of an alleged refusal to supply[53]. In keeping with the questions raised by this study, this much awaited decision is expected to answer the fundamental question raised by re-users and PSBs alike with regards to the PSI Directive: what is meant by the "public task"[54]?

The essence of this section, as discussed, can be shown in the following scheme:

[52] Austrian Supreme Court (Rekursgericht) case reference 25 Kt 3C/09-58, 17th March 2011. For an English summary and translation see de Vries, M., The Austrian Supreme Court has referred three important questions to the EU Court of Justice, seeking the demarcation of a "public task" and PSI re-use, Vienna, 20 April 2011, available at: ttp://www.epsiplus.net/news/news/austrian_supreme_court_moves_major_re_use_case_to_eu_court_of_justice.

[53] The Austrian Business Register (ABR, which is a PSB) collects company data as part of its public task. However, it also exclusively exploits this data on the market and prohibits others from doing so by relying on its IP rights. Given that ABR is the only source of this data, Compass-Datenbank GmbH brought this case alleging abuse of dominance. However, ABR contends in the first instance that there can be no abuse since it is acting within its public task, and so competition law cannot apply. Even if it were to apply, ABR further contends that there is no abuse since it cannot be required to give access to information from its database.

[54] The Austrian Supreme Court asks three questions. Firstly, when dealing with its PSI, when does a public sector body become an undertaking? (ie where is the line between the "public task" and entrepreneurial activities?). Secondly, does a public sector body become engaged as an entrepreneur if it collects PSI under a statutory regime and subsequently exploits the collected data but disallows any other and further exploitation? Thirdly, if the second question is answered in the positive, is there room for application of the "essential facilities doctrine" if there is no upstream market, as the PSI is collected within the framework of a public task? (See de Vries, M., supra).



The boxes above may in fact be divided into three main steps:

Firstly, (i), under Art 1(2)(a), as compared with Art 2(4), the issue is whether the initial purpose for producing the documents is within the scope of a public task of the PSB, i.e., whether the documents are supplied outside or inside the public task of the PSB.[55]

Secondly, (ii), under Art 2(4) the issue is whether the documents will be used for another purpose than the initial purpose for which they were supplied, i.e., whether the documents will be re-used. That this second purpose must be connected to an activity outside a public task seemed to be implied under Art 2(4). However, it depends on how Art 2(4) is interpreted.

[55] Cf. Art 1(2)(a) compared with Art 2(4).

Thirdly, (iii), under Art 10(2), the issue is whether the activity under which the documents are re-used is a commercial activity which falls outside the public task. Under Art 10(2) it is thus not the initial task for which the documents were supplied that is scrutinized. Instead, it is the ”re-use activity”.

In conclusion, the framework of the PSI Directive is complicated whereby the term ”public task” pops up twice: in the assessment of applicability of the Directive and the subsequent assessment whether own re-use by the PSB is caught by Art 10(2). Furthermore the term public task is to be fuelled by national law and practices. Accordingly, in the next paragraph we will look into the Swedish implementation of the PSI Directive, in particular the way it solved this ”public task” issue.

3.4 Understanding the Term ”Business Activity” in the Swedish Act

3.4.1 The line of reasoning of the Swedish legislator

Art 1(2)(a) of the PSI Directive has been transposed into Swedish law by section 4 of the Swedish PSI Act. This section provides that the PSI Act will not apply to documents provided by a PSB as part of its business activity.

> Section 4(2) reads:
>
> ”The Act does not apply to documents that a PSB provides to another PSB, except where it is indicated these documents are to be used in its business activity. Neither does the Act apply to documents provided by a PSB **in its business activity**.”

Confronted with the obligation to implement the PSI Directive, the Swedish legislator first of all looked at the term ”public task” and considered that Swedish law does not contain any explicit definition of what constitutes the public task that would correspond with the term in the Directive[56]. In its quest for another term, the Swedish legislator than applied the following analysis:

> ”According to Art 1(2)(a), the Directive applies only to documents within the authority’s public activity ”under the definition provided by law, legislation or 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”. Activities that are not public are in the Directive known as commercial (Art 10.2) and non-public (cf. preamble paragraph 9). Documents in such activities are therefore excluded from the scope of the Directive.”[57]

According to the legislator, the Directive however gives no clear definition of commercial activity either. In paragraph 9 of the preamble the Directive states that

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[56] Prop. 2009/10:175, p. 155 et seq.

[57] Prop. 2009/10:175, p. 154-155. Swedish legal terminology does, however, use a range of different expressions that describe the authorities” activities. Examples are the ”practice of authority” (*swe myndighetsutövning*), ”administrative functions” (*swe förvaltningsuppgifter*) and ”authority tasks” (*swe myndighetsuppgifter*). These terms are, according to the legislator, in many cases vague or at least inconclusive, and lacks of clear definitions.

an element to be considered when determining whether an activity is commercial is that the activity is conducted in competition with other operators in the market and that the charges are set on a commercial basis.[58]

The Swedish legislator continued and explained that although there is no definition of commercial activity, there is in chapter 2 section 26 a, third paragraph of the Swedish Copyright Act (SFS 1960:729), a provision for the use of public documents stipulating the term ”business activity” (Swe affärsverksamhet). The purpose of the copyright provision is to protect the commercial interests of the authorities. The preparatory works to the Copyright Act stressed that the public should be able to be conducted a business activity on equal terms with private businesses, and that the authorities engaged in commercial activities should not be in a worse position than other market participants. The rule focuses on public activities in, and subject to, conditions similar to those of private enterprise[59]. According to the preparatory works of the copyright rule, the fact that an activity is contributory is not sufficient for it to be considered as a business activity. In line with general competition law, the preparatory works also stressed that the economic objectives of the business does not need to aim to achieve a profit for the activity to be considered as a business activity.

The term “business activity” under the Swedish Copyright Act has, to our knowledge, not been interpreted by any Court. Nontheless, in the preparatory work to the PSI Act, the concept of business activity in section 26 a, third paragraph, point 9 of the Copyright Act was considered similar to the concept ”commercial activity” in the PSI Directive. The area covered by the concept of ”business activity” was assessed as being, in any event, not wider than that covered by the term ”commercial activity” in the Directive. The Swedish government therefore proposed that the documents that an authority provides in its business activity will be exempt from the PSI Act. Drawing parallels with recital 9 of the PSI Directive, ”business activities” in the PSI area typically denote documents provided on commercial terms in a market. When the authorities engage in such activities, it is usually in conditions similar to those of private enterprises. These activities should therefore not be covered by the PSI Act. However, the Government continued and stated that

> “...some authorities are responsible on behalf of the society to obtain and provide certain information, such as Lantmäteriet (the Swedish mapping, cadastral and land registration authority), Bolagsverket (the Swedish Companies Registration Office) and Skatteverket (the Tax Agency). When the authorities carries out such activities it cannot normally be considered as business activities, even if one is fully fee funded. It should be clear that such activities are covered by the proposed legislation.”[60]

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[58] Prop. 2009/10:175, p. 154-155.

[59] Prop. 1973:15 p. 134

[60] Prop. 2009/10:175, p. 156.

For these reasons the Swedish legislator chose not to use the term ”public task” and instead used ”business activity” when implementing the PSI Directive into Swedish law[61]. In the end, the Swedish PSI Act, instead of stating that the Act is not applicable when documents are supplied by public sector bodies outside the scope of public tasks, states that it is applicable to all documents supplied by public sector bodies as long as the document is not supplied within its ”business activity”.

The term “business activity” is used as the entrance requirement for the PSI Act. The same term is however used when triggering the non-discrimination requirement for when the PSB re-uses the document (cf. section 9 PSI Act). The legislation probably disregard this fact when stating the above. Nonetheless, the interaction–or rather, interface—between the two rules is troublesome and will be discussed below. Before that, the implementation of the PSI Directive in some other jurisdictions will be touched upon.

3.4.2 Implementation in other member states

It should be noted that the Swedish implementation is unusual. The majority of MS chose not to deviate from the wording of the Directive, and instead adopted a more ”copy and paste” approach into their national legislation. The approaches taken by Finland, France, the Netherlands, and the UK are set out in Annex 1. The only country uncovered in the process of this study to adopt a similar approach to the Swedish legislator was Denmark.

Implementation Example: Denmark

Denmark implemented the PSI-directive through *the Lov om videreanvendelse af den offentlige sektors informationer*[62](“the Danish Act”) on 25 June 2005. According to the preparatory works introducing the new legislation, the new Act does not change the access arrangements set out in the Danish Public Administrations Act.[63] However, the introduction of commercial re-use of public sector information, typically in the form of data in public databases, required a number of formalistic changes, including re-negotiation of existing agreements, and introduction of mandatory styles and other conditions required to facilitate the re-use of public information. The Danish Act also introduced the term ”*videreanvendelse”* (re-use) as a new legal concept in Danish law.

Regarding the concept of activities outside the scope of the public task in Art 1(2)a of the PSI Directive, Denmark has chosen a similar implementation method to Sweden, stating what type of document that should be excluded by referring to the type of activity that the information has been created as a result of. In section 1:2 1

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[61] A.a., p. 156-157.

[62] *Act on the re use of public sector information*, Act 596 of 24 June 2005.

[63] Skriftlig fremsættelse af Forslag til lov om videreanvendelse af den offentlige sektors informationer Lovforslag nr. L 141, 31 March 2005.

of the Danish Act, it is stated that the Act does not apply to document or information that has been ”produced” or ”enhanced” (Danish: *tilvejebragt eller kvalitetsforbedret*) as part of PS bodies” commercial activities. The Danish Act furthermore does not include documents/information generated by the Parliament and its institutions and courts.

In the Danish Act, the relevant term is phrased as ”*kommercielle aktiviteter*,” literally meaning commercial activities. In the preparatory works it is simply explained as revenue generating activities, including commercial activities.[64] However, why Denmark has chosen this particular way of implementing the PSI-directive is not further elaborated on, nor is the term commercial activities explained in any depth.

The Danish legislator selected to use the term ”commercial activity,” which may correspond to the Swedish ”business activity.” However, the Danish exception include both documents produced *and enhanced* as a part of the public sector body’s commercial activity, while the Swedish exemption aims for documents supplied in the public sector body’s business activity. Documents originating from non-business or non-commercial activity would, still, fall inside the Swedish PSI Act even though there are enhanced copies of these documents, while it is unclear whether such documents fall inside or outside the Danish PSI Act.

3.4.3 The Swedish Copyright Act (swe upphovsrättslagen)

Since the Swedish legislator adopted the term ”business activity” based on its use in the Swedish Copyright Act, the term in this context will now be examined. It appears in chapter 2 section 26 (a) of the Swedish Copyright Act, regarding the re-use of documents from an authority’s ”business activity”.

> Chapter 2 Section 26(a) reads:
>
> ”Everyone is entitled to reproduce documents that are prepared by Swedish public authorities ...
> ...this right does not apply to i.a.
>
> 9. Documents that are *provided* to the public through a PSB **in connection with business activity**
>
> Var och en får återge handlingar som är upprättade hos svenska myndigheter…
>
> …det gäller dock inte beträffande
>
> 9. verk av vilka exemplar genom en myndighets försorg **tillhandahålls allmänheten i samband med affärsverksamhet**”

The legislator’s choice to refer to the Swedish Copyright Act and the term ”business activity” used in the Copyright Act when implementing the PSI Act has been

[64] Bemærkninger til lovforslaget om Lov om ændring af lov om videreanvendelse af den offentlige sektors informationer, 12 March 2008.

subject to some criticism[65]. The term has been judged as far too vague and imprecise by, amongst others, the SCA. Nonetheless, the term ”business activity” was finally (re-)used and implemented in the PSI Act.

The copyright provision prohibits third parties from freely reproducing copyright protected documents supplied in a PSB's ”business activity”. Such documents are protected by copyright under, for example, section 49 of the Swedish Copyright Act, which enables PSBs to compete on equal terms with private undertakings, since they may limit third parties from copying these documents.

The criteria of ”business activity” outlined in the preparatory work of the Copyright Act is that the documents, or works, are produced under similar conditions as those of private enterprise[66]. Naturally the term covers documents produced in the pure purpose of making profit. However, the term also covers activities whereby mere self-support is intended. No consideration is made as to whether the entire authority is engaged in business activity or if only a part of the authority is engaged. Furthermore, of course, the Copyright Act does not differentiate between use and re-use of copyright protected documents. Compensation for copies is irrelevant if these criteria are met[67]. Thus, according to the Copyright Act and the adjoining preparatory works the term ”business activity” may have a wide scope.

As mentioned supra, copyright protection could enable a PSB to deny copying of re-used documents under the PSI Directive. However, the issue of whether there is copyright protection is not an issue when determining if a document was or is supplied outside the public task of a PSB under the PSI Directive. From the EU-legislator's viewpoint, documents falling inside the PSI Directive may very well be copyright protected. Some PSBs in Sweden, e.g., the Cadastre (Swe *Lantmäteri*), also take this into consideration and provide different licenses for different products.[68]

3.4.4 Public, Commercial and Non-Commercial Swedish Tasks and Activities

In the preparatory works of the PSI Act, the Swedish legislator, asides making reference to the term of ”business activity” in the Copyright Act, also refers to Art 1(2)(a) of the PSI Directive which provides that the PSI Directive applies only to documents within the PSBs public activity under the ”*as provided by law, legislation or 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*.”

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[65] Prop. 2009/10:175, p. 156.

[66] Prop. 1973:15, p. 134.

[67] Prop. 1973:15, p. 164.

[68] See http://www.lantmateriet.se/templates/LMV_FaqList.aspx?id=20340 last visited 2011-09-13.

To some extent it seems as if the legislator made use of the term ”business activity” under the assumption that such activities would always be ”outside public task” and therefore in line with the Directive. The question is, however, what constitutes the ”public task” in Sweden, and whether there are public tasks, under Swedish law, that are commercial, or even if there are public tasks that could be regarded as ”business activities”.

As discussed above, the notion, or scope, of public task under the PSI Directive can be interpreted broadly, encompassing everything a PSB is authorised to do under its public remit. Even though the Swedish legislator sought another definition of public task, the question is still if it is possible to identify a Swedish notion of the ”public task.” Especially, it would be interesting to identify a Swedish PSB that, as a public task, conducts a ”business activity” as intended by the Copyright Act. If such an activity exists, then the PSI Act has a narrower scope than the PSI Directive. Thus, if the activity is both a business activity and a public task, then the PSI Act is not prima facia applicable, while the PSI Directive in theory would be applicable.[69]

When looking for a notion of the ”public task” in Sweden, it should be noted that Swedish governmental agencies and municipalities are, as a principle rule, only allowed to act when they have an authority or mandate in law.

They often primarily provide public services of general interest, and do not to engage in commercial activities. According to chapter 2, paragraph 7, of the Swedish Municipality Act (SFS 1991:900), there is for example an exemption for ”customary municipal business” (Swe *sedvanlig kommunal näringsverksamhet*). Municipalities are allowed to conduct such businesses only under the condition that they have no profit-making purpose and that prices merely cover costs of production. For municipalities to be able to divert from this principle, they may acquire an exemption in law[70]. For an activity to be ”customary,” it has to be covered within its public competence and follow the restrictions for charges. The competence of a municipality is determined by its scope of public tasks, in other words what is of general interest of its members. With this construction, ”customary” municipal business, be it based on specific exemption in law or on the general exemption for ”customary municipal business,” is within the scope of the municipalities” public task.

Governmental agencies are bound by similar general rule as those of municipalities. In principle, this is derived from the Swedish Constitution stipulating that all public power must be conducted under the laws of Sweden. The Swedish Fee Regulation (Swe *Avgiftsförordningen, SFS 1992:191*) states that an agency under the government may charge for its services only if permitted by law. There are many exemptions regulated in law that allow, and often demand, PSB to conduct activities based on ”commercial grounds.” Examples are the Swedish Air

[69] However, a PSB might always claim copyright and thereby circumvent the PSI Directive,

[70] SOU 2007:72, p. 62 ff. , Prop. 2008/09:21, p. 19 et seq.

Navigation Services(Swe *Luftfartsverket*), the Swedish Maritime Administration (Swe *Sjöfartsverket*) and the Swedish State Railways (Swe *Statens Järnvägar*). A further example is the Swedish National Grid (Swe *Svenska Kraftnät*) which is a state-owned public utility with the task of transmitting electricity from the major power stations to regional electrical grids.[71] In the area of PSI, Metria, a former division of the Cadastre (Lantmäteriet) that was turned into a limited company in 2011, may conduct commercial activities. Metria is now fully owned and controlled by the Government and will provide online access to relevant Cadastre databases for a fee.

Generally, when parts of public authorities are reorganized under limited companies they also are allowed to maximize profits. Their instructions clearly state that the activity shall be operated on commercial grounds

Furthermore, the PSBs responsible for obtaining and providing certain information on behalf of the society, such as of the Cadastre (Lantmäteriet) , the Swedish Companies Registration Office (Bolagsverket) and the National Tax Board (Skatteverket), also generally have a legal mandate to conduct activities where they sell their PSI or provide access to their databases as a service function.

The PSBs discussed in the paragraph above are, i.e. those PSBs that control such databases that the PSI Directive specifically caters to, and they are also singled out in the Swedish preparatory works as subject to the PSI Act.[72] Interestingly, when analyzing the regulatory instructions of these PSBs, they often state, on the one hand, the specific tasks or responsibilities that PSBs will conduct. On the other, the instructions also stipulate lists of optional tasks, i.e., tasks or services that the PSB may decide to conduct at its own discretion.[73] Often the documents of interest to this report are collected as part of the tasks that the PSB is required by law or instructions to conduct, while the documents are then re-used under the activities or services stipulated as optional in their respective instructions.

The dichotomy between obligatory and optional tasks may indicate that under Swedish public law and general administrative practices, the task that the public authorities conduct according the their respective instructions could be considered

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[71] Regulation (2007:1119) with instructions for the Swedish utility power grid, 1 §.

[72] "Some authorities such as Lantmäteriet (the Swedish mapping, cadastral and land registration authority), Bolagsverket (the Swedish Companies Registration Office) and the Tax Agency, are responsible on behalf of the society to obtain and provide certain information. When the authorities carry out such activities it cannot normally be considered business activity, even if one is fully fee-funded. It should be clear that such activities are covered by the proposed legislation." Prop. 2009/10:175, p. 156.

[73] See for example the Instruction for the Bolagsverket (SFS 2007:1110) Sections 1-5 a compared to Section 6. The Act regulating SPAR, the database for addresses and persons overseen by the Swedish Tax Authority has a similar division between required tasks and optional tasks, cf. Act (SFS 1998:527) om det statliga personadressregistret. In reference to the Cadastre, this was true according to the old instructions (before the division Metria was transformed into a limited company); see SFS 2008:694 compared to SFS 2009:946. In SFS 2009:946, it actually seems that giving access (as a service) to the relevant databases has become a hard-core requirement rather than a optional task for the Cadastre. Nonetheless, the Cadastre seem to have implemented the PSI Act and PSI Directive, see http://www.lantmateriet.se/templates/LMV_FaqList.aspx?id=20340 last visited 2011-09-13.

their public tasks, while the tasks that the PSB may conduct at its own discretion are not their actual public tasks in relation to the central government, public duty. Rather, they are services to be provided at their own discretion. Furthermore these services seem to become available based on whether the PSB indentifies a need for the service in society that can be met by their own resources. Providing these services seem to depend on whether the tasks that the PSB is obliged to conduct are managed in an appropriate fashion. Only when these are conducted in a satisfactory manner will the PSB engage in optional tasks. Furthermore, some of these services are only provided if the costs of providing them are, at least in the long run, borne by the attended addressees of the service, i.e. the customers. The logical reason for this would be that these optional services should not interfere with obligatory tasks.

From this reasoning, but without reaching any premature conclusions, a Swedish interpretation of inside/outside a public task according to the PSI Directive could draw some inspiration of the dichotomy between obligatory tasks and prerogative tasks in the laws and instructions for the relevant PSBs.

3.5 The term “business activity” in paragraph 9 of the PSI Act

In addition to the problems with the interpretation of the term “business activity” in section 4 of the Swedish PSI Act, the introduction of the same term in section 9 of the PSI Act, and the interaction—or rather, interface—between the two sections may also prove troublesome.

Section 9 has been included in the PSI Act in order to implement Art 10 of the PSI Directive.

Art 10(2) of the PSI Directive reads:

“If documents are re-used by a public sector body as input for its commercial activities which fall outside the scope of its public tasks, the same charges and other conditions shall apply to the supply of the documents for those activities as apply to other users.”

Section 9 of the PSI Act reads:

”Om en myndighet vidareutnyttjar handlingar i sin affärsverksamhet ska samma avgifter och andra villkor för tillhandahållande av handlingarna tillämpas för denna verksamhet som för andra som vidareutnyttjar handlingar.”

Unofficial translation into English:

“If a public sector body re-uses documents as a part of their business activity, the same fees and conditions for the supply of the PSI that apply to this activity must also apply for other re-users of the PSI.”

Art 10(2) has been incorporated into the PSI Directive in order to ensure that the competition on the market for re-usable PSI is not distorted by a PSB supplying PSI to its own commercial branch. By ensuring that the same charges and conditions are applied to commercial branch of a PSB as to other potential re-users, the idea is that the PSI will be supplied on non-discriminatory terms to whoever wishes to re-use it, be it a PSB branch or a purely private market player.

In itself, Art 10(2) of the PSI Directive is straightforward and not very controversial. However, the wording chosen to implement the corresponding section in the Swedish PSI Act creates a problem because "business activity" is used both in section 4 and in section 9.

As can be seen above, the wording used to describe the branch and activity of an intended PSB in the PSI Directive is "commercial activities". Since the demarcation line for applicability of the PSI Directive is activities inside the scope of the public task, this still leaves room for a differentiation of commercial and non-commercial public-task (and non-public task) activities, which explains the need for Art 10(2).

However, since the Swedish PSI Act has defined the scope of the act by stating that it applies to activities other than business activities, a problem occurs when the same wording, business activities, is used for the non-discrimination regulation in section 9 of the PSI Act.

As discussed above, the EU-legislator uses different terms for gaining access to the PSI Directive (public task in Art 1(2)(a)) and triggering 10(2)(commercial activity).

In the preparatory works to the PSI Act, the Swedish legislator has only commented on section 9 by stating that the provision is aimed towards situations where competitive constraints could occur.[74] The provision is also intended to contribute to the overall aim of the PSI Directive by encouraging the PSB to respect competition regulations when establishing the principles for supply of information for re-use, thus not favouring their own "business" compared to other re-users. The legislator also notices that the Swedish Competition Act can become applicable to such situations but does not elaborate any further on how the Swedish Competition Act will interplay with the regulation in section 9.[75]

The Swedish legislator has not further developed how the term "business activity" in section 9 should be interpreted. The preparatory works simply refers back to the definition under section 4, indicating that the term should be interpreted in the same manner.[76] Thus, according to the legislator, the interpretation of the term business activity in section 4 of the Swedish PSI Act will have consequences for the interpretation of the term used in section 9.

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[74] Prop. 2009/10:175, p. 168

[75] Prop. 2009/10:175, p. 168

[76] Prop. 2009/10:175, p. 167

That being said, there is a difference between section 4 and section 9 of the PSI Act. In order to remedy the situation, we firstly need to establish what activities should be analyzed where, and how section 4 relates to section 9, i.e., the method used under the PSI Act.

Section 4, is the "doorway" to get inside the PSI Act. Thus, section 4 aims at the purpose of creating or collecting the PSI. Thereafter, section 6 defines what constitutes a re-use and, not until Section 9, the issue is whether the re-use activity is a business activity. As a matter of fact, Section 9 demands that the Court find a non-business activity from which the documents originates, otherwise there is no re-use under section 6.

As with the PSI Directive, the PSI Act implies a three step test. However, i detail teh test is different:

Firstly, (i), under section 4, the issue is whether the initial purpose for supplying the documents is within the scope of a non-business activity.[77]

Secondly, (ii), under section 6 the issue is whether the documents will be used for another purpose than the initial purpose for which they were supplied, i.e., whether the documents are re-used.

Thirdly, (iii), under section 9, the issue is whether the activity under which the documents are re-used is a business activity.

In other words, the activities to be judged under section 4 compared to section 9 are different. Under section 4, it is the original activity, whereas under section 9 it is the re-use activity. It should further be noted that neither under section 9 nor in section 6[78] is there a requirement that the business activity should be outside the scope of the PSB's public task. Thus, even though, for example, the task would be considered a public task in the instructions for the PSB in question, that is irrelevant as long as the PSI is re-used. The notion of "re-use" under the PSI Directive could possibly be narrower, implying that re-use implies not only that there is another (second) purpose for using the documents, but also that this second activity is "outside public task".[79]

An issue for discussion is whether "business activity" under section 4 should be interpreted in light of "outside a public task" under Art 1(2)(a) and "business activity" under section 9 should be interpreted in light of "commercial activity" under Art 10(2). In other words, can the term "business activity" have different meaning under different sections in the PSI Act?

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[77] Cf. Art 1(2)(a) compared with Art 2(4).

[78] The definition of re-use under the PSI Act is broad. Cf. prop 2009/10:175, p. 147 *et seq*.

[79] That the Swedish legislator wanted a wide defintition of re-use is clear. Cf. Prop. 2009/10:175 p. 147 *et seq*.

Under EU law and the doctrine of indirect effect, national authorities, including courts, have an obligation to perform such an interpretation of national law (indirect effect) so as to ensure that the results the directive seeks to achieve are fulfilled.[80] This obligation does not require the direct effect of the directive's provisions.

Even though, prima facia, it might feel inconsistent to interpret a similar term differently in different sections of the same act, under national legal systems the national authorities are under the duty to give full effect to the rule or right stipulated under Art 10(2) PSI Directive .

However, the need to interpret business activity differently in section 4 compared to section 9 is perhaps not paramount, given that according to the three-step test above, different activities must be scrutinized.

3.6 Assessing the Swedish Implementation Using the Term Business Activity

The question as to how the scope of the PSI Act corresponds to the intended scope of the PSI Directive must now be resolved. If the term ”business activity” in the PSI Act were to equate to ”commercial activity” as understood by the Swedish legislator to appear in the PSI Directive, a problem arise whereby the scope of the PSI Act is narrower than that of the Directive. This would be the case if the PSI Act actually does not encompass documents which were intended to be covered by the PSI Directive (even when using a Swedish interpretation of public task, cf. supra). Thus, documents supplied in public task would be encompassed by the PSI Directive, but may fall outside the PSI Act since they could still be considered as part of a PSBs ”business activity” (and therefore excluded by section 4 of the Act).

From the above explanatory section on the PSI Directive itself, it is by now understood that activities that generate PSI and are outside the public task (and so outside the scope of the Directive) do not correspond to the term ”commercial activity” mentioned in Art 10(2) of the Directive. According to the logic behind the PSI Directive commercial activities may be public tasks and encompassed by the PSI Directive. Thus, using commercial activities as a point of reference for when the PSI Act is triggered in not consistent with the inherent logic of the PSI Directive. A PSB may have a business activity as a its public task. Furthermore, under Swedish law and general administrative practices, a PSB may, at least in theory, have a commercial practice as its public task.[81] On the basis of this fact, it appears that the Swedish legislator misinterpreted the provisions of the Directive to come to this term by connecting to the wrong ”level”, as the table below demonstrates:

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[80] Case law starting with 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* (para. 26).

[81] For example, according to sections 5 and 30 of instructions for the Lantmäteriet (the Cadastre)(SFS 2009:946), the Cadastre seems to have as an obligatory public task to give access to basic geographic information for a fee.

	PSI Directive		**SE PSI Act**	
Tasks done for:	Public task	Arts	Activities other than **business activity**	Sections
Result:	Public task leading to the supply of PSI is liable to PSI Directive	1(2)	Non-business activities leading to the supply of PSI are liable to PSI Act	4
Re-use:	= second use (by definition outside PT)	2(4)	= second use (different purpose)	6
Actor:	PSB itself = "**typically commercial** outside public task	10(2)	PSB itself = re-use for a business activity	9

If the term "business activity" was to equate to "commercial activity," this would be a problem since the PSI Directive clearly leaves room for a public task to include commercial elements, as well as for activities outside the scope of public task to be non-commercial. Thus, the PSI Act would in one sense be too narrow in scope and not fulfill the minimum requirements of the PSI Directive since Swedish commercial public task activities could, possibly, be interpreted as falling outside the PSI Act. The PSI Act would also be, in light of the PSI Directive, too broad in scope by encompassing non-business activities that falls outside its public task.

		PSI Act Section 4	
		Non-business (commercial) activities	Business (commercial) activities
PSI Directive	Public tasks	OK	Problem: SE Act does not apply, where it should
	Non-public tasks	Problem: SE Act does apply where it should not	OK

Notwithstanding the above, whether the Swedish legislator has connected the term "business activity" with "commercial activity" under section 4 of the PSI Act, or whether they have separate meaning and thus scope, is a main point for discussion. If these terms equate, the PSI Act still may stipulate too narrow a scope. From the outset of the PSI Directive, as discussed supra, commercial activity could be conducted by a PSB as a public task. The EU legislator therefore implied that documents supplied for commercial activity could still be considered supplied within a public task and be encompassed by the PSI Directive.

The PSI Directive gives a set of minimum rules to be implemented, and the Member States are free to implement a larger scope for the national implementations in the interest of competition. Furthermore, the definition of a public task is at the discretion of the member states, respectively. Hence, the problem is not whether the PSI Act incorporates too much, but whether there are public task activities, as identified under the Swedish legal system and administrative practices, that are not encompassed by the PSI Act. If this is the case, then the PSI Act does not represent the result that the EU legislator intended. The preparatory works clearly state that when certain authorities responsible for providing and obtaining certain information for society carry these out within their public remit, they cannot normally be considered as ”business activities”, even if they are fully fee funded. The legislator therefore recognized that these (commercial) activities *should* be subject to the PSI Act. The logical conclusion must be that the legislator implied that section 4 of the PSI Act should be triggered by the conduct of these authorities collecting data for these databases.

The only way to reconcile this conclusionwith the PSI Directive is to interpret the statement as the legislator acknowledging that obtaining this information is not a business activity. However, the statement should not imply that *providing* access to these databases is not a business activity. Providing such access is likely commercial according to Art 10(2) of the PSI Directive. The documents provided by a PSB in its activities, as exemplified above, should also have copyright according to the Swedish Copyright Act (cf. sections 26 a and 49) because the conduct is most likely a ”business activity” according to section 26 a of the Swedish Copyright Act.

A further factor to take into consideration is that section 9 of the PSI Act, does not require the business activity to be outside the public task of the PSB.

All-in-all, it must be stated that since there is a possibility that Swedish PSB as a public task, supplies documents for a business activity, as its initial purpose, the section 4 of the PSI Act does not correspond to Art 1(2)(a). Therefore, if an activity is both a business activity and inside the scope of a public task, then the PSI Act should still be applicable due to the doctrine of indirect effect.

However, under the same doctrine, section 9 of the PSI Act should be interpreted differently. Section 9 of the PSI Act should be interpreted in light of Art 10(2) PSI Directive. The requirement needed to be fulfilled is whether the activity is a business activity. Thus, that the second re-use activity is a public task according to, for example, the instructions for the PSB, is irrelevant as long as it is a business activity according to the PSI Act. Whether this difference, implying that the PSI Act will become applicable in much more situations compared to the PSI Directive, was intended by the Swedish legislator could be disputed.[82]

[82] One way for a court to limit this wide definition of re-use is to interpret section 6 to also include a requirement of “outside public task”.

In light of the above, it seems that the legislator disregarded the three-step method described above and combined step (i) with (iii).

3.7 Conclusions as to the Swedish Implementation

3.7.1 The Swedish PSI Act as it Stands Today

In referring to the term ”business activity” in the Swedish Copyright Act, the legislator throughout the preparatory works contradicted itself and the purpose behind the PSI Directive. Business activity under section 4 of the PSI Act cannot have a similar meaning as commercial activity in Art 10(2) PSI Directive. Commercial activity in Art 10(2) of the PSI Directive is primarily a description of a specific re-use, rather than the demarcation line between whether the Directive is applicable or not. To interpret business activity so that it would equate to ”commercial activity” would not be in accordance with the PSI Directive. Such an interpretation could actually render the PSI Act to be in violation of the PSI Directive. As stated above, the PSI Act probably is in violation of the PSI Directive by not recognizing the inherent logic that governs the directive and by not recognizing that under Swedish law and public practises a PSB may have a business activity as its initial public task.[83]

However, the legislator must have had the idea that ”business activity” in the Copyright Act was indeed different from the term business activity in the PSI Act, since it stated in the preparatory works that providing access to re-use the larger databases cannot be a business activity. Furthermore, the legislator stated that the scope of ”business activity” is in no case wider than that of “commercial activity.” Implicitly, the legislator therefore made room for the possibility that “business activity” could be interpreted as being narrower in scope than “commercial activity”.

As such, the definition of ”business activity” must be made in context, with the purpose of the PSI Directive and the reasons for public transparency and competition in mind. Elements of commercial interests, competition and public transparency all play a part in the definition of ”business activity”. If business activity can be interpreted in such a way so not to encompass public tasks, then the PSI Act would correspond to the PSI Directive. In this activity the understanding that the PSI Directive probably has a direct effect should be taken into consideration, as well as the far-reaching obligation the EU Court has placed on the Member States to interpret national legislation to correspond to EU directives.[84]

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[83] For example, according to sections 5 and 30 of instructions for the Lantmäteriet (the Cadastre)(SFS 2009:946), the Cadastre seems to have as an obligatory public task to give access to basic geographic information for a fee.

[84] Case law starting with 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* (para. 26)and 103/88 *Fratelli Constanzo SpA v. Comune di Milano* (se para. 30 – 31).

In this sub-chapter, "public task" and "business activity" will, as far as possible, respectively be definedand, in the end, a solution to the PSI Act problem or interface with the PSI Directive will be presented.

From the outset, the method to be used under the PSI Act should be clear. As stated above, and in line with the PSI Directive, a three-step test should be put into effect:

Firstly, (i), under section 4, the issue is whether the *initial purpose* for supplying the documents is within the scope of a non-business activity.[85]

Secondly, (ii), under section 6 the issue is whether the documents will be used for *another purpose* than the initial purpose for which they were supplied (dvs. handlingen skall användas i ett annat syfte än det den initial skapades för), i.e., whether the documents are re-used.

Thirdly, (iii), under section 9, it is the PSB's own re-use to be scrutinized, the issue is whether the activity under which the documents are re-used is a business activity.

In practice, the trick in the above method is to identify the re-use, i.e., the initial task, the change of purpose and, hence, change in activities. This requirements must be fulfilled; otherwise, the PSI Act may not be utilized.

3.7.2 Some Rules of Thumb for Deciding what Is "Public Task"?

Obviously, this still leaves open the issue how to define the "public task," which is made even more difficult by the stipulation in Art 1(2)(a) that this is up to the Member States' legislation and practices. In absence of the term public task in the Swedish PSI Act, and since there is no definition of this term in Swedish law, the following provide some rules of thumb that can be applied assessing the character of an activity (is it in or outside public task?). Where an activity is inside the public task, and thus caught by the PSI Directive, the Swedish framework should also be applicable[86] and provide at least this level of coverage.

(i) What is the legal regime?

Is the supply of PSI the result of the legal regime the PSB works under? The public task may be stipulated in a law or legislative act, or it may be possible to interpret duties of the PSB from the legal framework in place.

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[85] Cf. Art 1(2)(a) compared with Art 2(4).

[86] As detailed in Janssen, K., *The EC Legal Framework for the Availability of Public Sector Spatial Data: An examination of the criteria for applying the directive on access to environmental information, the PSI directive and the INSPIRE directive* (Aalphen aan den Rijn, Kluwer Law International, 2010).

This criterion is difficult to use under Swedish law, given the fact that an interpretation only based on the above could very well end in the conclusion that there are no activities conducted by PSBs in Sweden that fall ”outside public task”. A distinction needs to be made between authorative and prerogative conduct. A court can put emphasis on the fact if a PSB is obliged or has been authorised to engage in a certain activity. There are activities that the PSB is obliged to conduct and activities or tasks where they have a prerogative (skillnad mellan “skall” och ”får”). For this reason, the authorisation and its phrasing do give some indicators, but are not decisive and further criteria need to be looked at.

(ii) Is it in the core initial business of the PSB?

If information activity is the essential initial part for the everyday actions of the PSB, it is far more likely that the production, processing, and eventual supply of the PSI falls under the core responsibility of the PSB as part of its public task. As such, these essential activities would come within the scope of the Directive. Generally, it seems activities outside a public task are follow-on services and, generally, not within the sphere of activities that constituted actions for the PSB’s original objective.

(iii) Is there a strong public interest?

Where there is a strong public interest involved in the production, processing or distribution of the PSI concerned (whereby society at large and not just a small group is benefiting), it is more likely that the activity will be within the public task. This means that weighing the needs of society can indicate whether the task is public and, as a result, whether the conduct should be covered by the PSI Directive.

In comparison, string or narrow services may be outside the public task.

(iv) Is the PSB filling a gap where there is a market failure?

A PSB may be supplying the information because the market has failed, to the disadvantage of the general public who can no longer access it. Without the engagement of the government, the PSI would not be produced, since the market would not be able or willing to perform this task. This failure could be a failure of competition or be linked to quality control[87].

(v) Is the PSB making data not only available but also accessible?

[87] In information markets, this could be the case where the government knows that information services are being offered on the market, but it is unsure whether this is objective or error-checked. It may then decide, for example, that it should offer this information to the public itself in order to ensure the community interest. If the market cannot produce goods or services competitively and of a sound and reliable quality then the PSB may have to step in. In some countries, such as France, this concept is used to limit the information activities of public bodies; there, public bodies can only intervene where the market has failed to do so.

There is a fine line between added value services and accessibility for the public. In the context of the PSI Directive, we must essentially ask ourselves when (if at all) is adding value within the purpose of fulfilling the task, and at what point does it go beyond this and act as a re-user on the market?[88] Very broadly, data should be understandable, available in an organised format and searchable where appropriate[89]. It is usually part of the public task to ensure that this is so. It is notable that the Directive does not lay out that this should be available for free, but the cost should not be so high so as to act as a barrier for large groups of the public.

Conversely, it is also possible to narrow the concept of the ”public task” further by looking at a PSB should *not* become involved within the scope of this notion. Thus, this may reflect what should be considered as outside a public taskand falling outside the scope of the PSI Act.

(i) Replicate existing services

Where services are already being provided on the market could imply that the activities of the PSB is outside a public task. This could be the case where a certain basic data set is being re-used by (commercial or non-commercial) market participants to produced added value services. If the PSB would step in and provide such services, this could be considered anti-competitive if for example the PSB as the data holder should apply discriminatory charges.

(ii) Undertake exclusively commercial activities on a competitive market

As discussed above, according to recital 9 of the PSI Directive, activities *typically*, outside public task are where the production and supply of information is charged *exclusively on a commercial basis* and *in competition* with others in the market. However, by using the word ”typically”, the PSI Directive does not exclude activities solely based on commercial grounds from the definition of ”public task”. Nonetheless, activities where the PSB seeks to maximise profit could be considered activities that likely fall outside public task.

(iii) Act where there is no legal obligation

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[88] By encouraging re-use of PSI, the Directive aims to make information more available to the public. However, if data is not also *accessible* then this is an effort wasted; making such information accessible to the public on open and objective criteria can be seen as a matter of the public interest. Here, we can distinguish three different sub-sets of accessibility: Data should be *physically accessible; accessible at a cost that is generally affordable; and intellectually accessible*. Unfortunately, accessibility is fluid concept , which is problematic for our definition of the public task. What is accessible for one person may not be for another, and this is accentuated in information markets where a variety of re-users might need the information.

[89] The level of intervention required to be accessible can vary depending on the re-users and the type of information; for example information may be developed for specific domains like the legal profession. The background knowledge of the target group within a subject area can determine the level of intervention needed to make information accessible. If a PSB goes beyond the basic level of need of this group then this would be outside the public task, and the activities would take place ”on the market”. This has further consequences from a competition law perspective.

It could be said that PSBs should only disseminate PSI where they are called to do so within their public task[90]. However, this may be in contrast with the finding that a PSB should become involved where there is a market failure that needs to be rectified. In such cases, supplying PSI may not be strictly within their legal obligations, but could fall within their wider remit to meet needs in the general interest of the public.

(iv) Make unnecessary modifications to databases, or add value to datasets or services

This can also be seen as an unwarranted extension of the powers of a PSB: where databases can be modified or improved upon by the private sector, PSBs should not intervene[91].

Similarly, as much as possible, PSBs should steer clear of providing value-added services that could be provided by the private sector. Such activities will be subject to competition law as the PSB will be acting on the market.

(v) Take actions which exclude private sector activity

Given the thin line which public sector bodies walk as monopolists for the information they hold, they must take great care to ensure that their actions do not threaten private sector activity. This is emphasised in the PSI Directive, as well as being supported by general competition law provisions which are applicable where the PSB acts as an "undertaking."

(vi) Provide specialised services

Again, this reduces or even excludes the possibility of the private sector developing marketable services.

In conclusion, the term "public task" may be interpreted from a Swedish perspective as the core initial important activities of a PSB, whereas non-public tasks are follow-on activities. Such activities may be voluntary, and only in practice may they be conducted when the PSB are satisfied that the core business is satisfactorily in place and working properly: activities that may be conducted when there is spare capacity, and which could be conducted without causing costs to the

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[90] As in Janssen, Idem: French 1994 Circular regarding the dissemination of public sector data also had a limited view of the provision of information services by the public bodies. Public bodies should not get involved if they have no legal obligation to provide an information service, if the information has a legal value and if it is not secret. In those cases, the provision of information services should be left to the private sector. However, the Circular makes a distinction between public bodies whose mission is to disseminate information and all the other public bodies. The former can actually also provide the information services along with the private sector.

[91] Janssen, K., *The EC Legal Framework for the Availability of Public Sector Spatial Data: An examination of the criteria for applying the directive on access to environmental information, the PSI directive and the INSPIRE directive* (Aalphen aan den Rijn, Kluwer Law International, 2010) notes that the Dutch approach at the end of the 1990s was similar: the public bodies should not make unnecessary modifications to their databases, which could be done by the private sector.

core activities of the PSB. Often such follow-on activities may be commercial, but it is not always the case.

3.7.3 Some Rules of Thumb for Deciding what is a "Business Activity"?

(i) Commercial character

The preparatory works of the PSI Act, as well as the preparatory Act of the Swedish Copyright Act, also state that "business activities" are typically operated on a commercial basis.[92] This criterion is also often the dividing line between "customary municipal business activities" and activities traditionally operated by private operators under Swedish municipal law. For this reason, charges on a commercial basis are an important part of the definition of "business activity" in the meaning of the PSI Act. Nonetheless, the preparatory Act of the Swedish Copyright Act does not exclude activities that operate on a self-support basis from being characterized as "business activities."[93] Thus, there are different degrees of commercial elements. Financial gain as an aim is not in itself determinative for the definition of "business activity", but it is a strong indicator. However, for an activity to constitute "business activity" under the section 4 of the PSI Act, it necessarily must be conducted on a market. These services seem to become available based on whether the PSB identifies a need for the service in society that can be met by their own available resources. These services are only provided if the costs of providing them are, at least in the long run, borne by the intended customers of the service. In light of this, there are probably few PSBs in Sweden that would be able to successfully claim that their documents are initially produced and supplied with a commercial purpose in a business activity. The PSI Act therefore often becomes applicable, the threshold under section 4 is low.

However, under section 9 of the PSI Act, i.e., when the re-use activity is analyzed and not the original purpose and activity, it might very well be that a profit or at least remuneration is obtained by the PSB to the effect that the PSB feel content in conducting the activity.

It all depends on how the charges or fees should be compared to the cost incurred in the commercial branch of the PSB. The PSI in question actually should be considered a commercial asset and to access it is a service. The whole purpose behind the PSI Directive is that the documents are an asset that the commercial arm of the PSB is given and when the PSB provides access to it, the cost of creating the documents cannot be included in the estimation of the cost of providing access. These costs have been borne in the public task activity of the PSB.

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[92] Prop. 2009/10:175, p. 155 ff., and Prop. 1973:15, p. 134 ff.

[93] Prop. 1973:15, p. 164.

If, for example, the commercial branch is given access to a PSI database, derived from the PSB conducting its public task, so as to provide sub-access or re-use to third parties for a fee or fees, it is quite likely that such fee(s) would not correspond to the actual cost incurred by granting access to the database, or the cost of granting access to individual documents in the database under regular Swedish or international accounting rules and principles. Granting access to a database that has been set up and where there is spare capacity would cause the proprietor of the database very minimal costs. If the PSB demands fees to cover the costs of setting up of the database, this would imply that the PSB is actually gaining a profit since those costs should not be borne by the commercial arm of the PSB but by the public arm.

Notwithstanding the above, a task may very well be a business activity without creating any profit for the PSB in question.

(ii) Relevant market

It is also clear that business activities are conducted on a relevant market. There are purchasers of the service provided, i.e., easy access to PSI, rather than citizens exploiting their constitutional right to access.[94]

That the notion that a PSB is active on a "relevant market", selling a service, should affect the definition of the term business activity seems to be in line with other research conducted under Swedish law.[95] However, the fact that the PSB is the only service provider on such market should not affect the conclusion that there is a relevant market.

(iii) Competition law

In reference to the above, it is quite clear that the Swedish legislator rightly pointed out that business activity may very well be interpreted in accordance with general competition law.

An activity governed by competition law may actually indicate that the activity is a "business activity" in the sense of Section 10(2) and 9 of the Swedish PSI Act. Whether or not an activity is economically based on the definition of "undertaking" under competition law. The characteristic features of an "economic activity" is (i) the offering of goods or services on the market, (ii) where the activity could be carried on by a private undertaking in order to make profits. If these requirements

[94] "Till främjande av ett fritt meningsutbyte och en allsidig upplysning skall varje svensk medborgare ha rätt att taga del av allmänna handlingar" (2 kap. 1 § tryckfrihetsförordningen, som enligt 14 kap. 5 § som regel gäller även utlänningar.)

[95] SOU 2008:118 Förvaltningskommitténs slutbetänkande "Styra och ställa", p. 123 *et seq*.

are met, it is irrelevant under general competition law if the entity does not in fact make a profit or if it is not set up for an economic purpose.[96]

3.7.4 Possible solutions: a dichotomy between "business activity" and "commercial activity" and between "business activity" in the Swedish Copyright Act and the PSI Act

In an effort to identify what triggers section 4, the most efficient way to go about this is to interpret "documents provided by a PSB in its business activity" in light of the PSI Directive, because those documents provided under a public task should alsotrigger the PSI Act.

Business activities under section 4 could be defined as activities where the PSB actually engages in non-public voluntary tasks, e.g., in pure *original competitive* conduct, where the original purpose is to create a copyright-protected document/product to compete on a relevant market. This is not a task that the PSB must conduct according to the relevant instructions but rather a voluntary exercise. If it is an obligatory activity for the PSB, irrespective of fulfilling the requirements of a business activity, it is a public task and should trigger the application of the PSI Act. Thus, in specific, if the requirements for a public task according to the PSI Dirctive are fulfilled, then section 4 of the PSI Act should also be triggered. Public tasks in the directive trump business activities in section 4 of the act. Such application conforms with the direct effect of Art 1(2)(a) of the PSI Directive or at least according to the principle of supremacy of EU law and the doctrine of indirect effect of directives.[97] However, in these cases section 6 would seldom be triggered by the PSB since there is no re-use. The original purpose of a business activity prevails. However, section 4 must still be triggered, or fulfilled; otherwise, the PSI Act does not enact the PSI Directive accurately.

On the other hand, under section 9, the term "business activity" may have the same meaning as under section 4, but there is a different activity to be judged, i.e., not the original conduct but the second, follow-on, conduct. Interestingly, if this re-use activity is both a business activity and a public task, section 9 is still applicable, whereas Art 10(2) would not have been. Thus, in this sense the PSI Act includes more activity than the PSI Directive, which is in accordance with general EU law. The PSI Directive only stipulates the minimum requirements.

In fact, this is probably the Swedish legislator's intention with the PSI Act from the outset, but by borrowing the term "business activity" from the Copyright Act and equating it with the term "commercial activity" as it believed the PSI Directive meant, the legislator made a confusing connection.

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[96] See C-76/96, Albany International BV [1999] ECR I-5751 See Jacobs AG para 311. Several cases have followed in beginning with this case.

[97] Case law starting with 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* (para. 26)
and 103/88 *Fratelli Constanzo SpA v. Comune di Milano* (se para. 30 – 31).

All in all:

"Business activity" in section 4 of the PSI Act should not be interpreted as corresponding to commercial activity, because "public tasks" include commercial activities under the PSI Directive as well as under Swedish law. This cuts against the wording of the PSI Act's preparatory works but is probably not the intention of the Swedish legislator. In the event a "business activity" is an original public task of aSwedish PSB, the PSI Act is still triggered, i.e., public task trumps business activity.

"Business activity" in section 4 of the PSI Act should not correspond to business activity in the Swedish Copyright Act, since clearly databases/documents created and supplied by, for example, the Cadastre (Lantmäteriet) and the Swedish Companies Registration Office (Bolagsverket) should have copyright protection while still being included under the act, according to the PSI Act's preparatory works. In general, business activity under both section 4 and 9 should be interpreted in accordance with competition law, i.e., when competition law may be applied to activities conducted by PSBs, with the twist that public tasks trump business activity under section 4.

3.8 A look into the future

Finally, there is a ray of hope that further clarification may be provided on the scope of the "public task" in the PSI Directive. The EU Commission has taken steps towards reviewing the Directive, with the issue of what constitutes the "public task" being raised multiple times in the recent online consultation of stakeholders as part of this review process. Many re-users, academics and even PSBs indicated that *"the lack of a clear definition of what constitutes a public task is one of the main hurdles for data re-use."* It was suggested by some that although impossible to define the "public task", the European Commission should develop a procedure for MS to follow in order to give more precision to the concept. On the basis thereof it can be seen that the interpretation of the "public task", has been an issue not only for Sweden but also for other MS which has formed a stumbling block for the concrete implementation of the Directive. Therefore, if the Commission would decide to actually review the Directive – a political decision hereon is expected in the Fall of 2011 – it is very likely that this point will be brought up once again.

4 Interpreting the Term ”Exclusive Rights”

Essence: The PSI Directive contains provisions on both licensing (including non-discrimination of terms) and the granting of exclusive rights. This chapter will first examine the interaction between these provisions. Then, as the core of this chapter, the connection between the term "exclusive rights" in the PSI Directive and Act, as well as Art 106 TFEU will be examined in detail. The meaning of the term in the context of Art 106 TFEU appears in conflict with the meaning in the Commission supporting statement in the context of the PSI Directive, and consequently the PSI Act. This chapter aims to resolve confusion caused therein by looking at the aims of Art11, examining the number of undertakings that can be granted an "exclusive right" as well as whether rights granted via tender procedures can be "exclusive." In addition this chapter addresses the confusion between "licensing agreements" and "exclusive agreements."

4.1 Introduction

Art11 of the Directive and section 10 of the Swedish PSI Act ban exclusive arrangements between PSBs and re-users. Unfortunately, the PSI Directive remains silent as to the question whether this ban only catches arrangements between a public sector body and one other contractor or also arrangements that provide rights to more than one (but a limited number) of contractors.

The problems in Sweden were illustrated by mapping[98] done in 2010 on exclusive rights granted, showing that the meaning of ”exclusive rights” is unclear and Swedish municipalities and State agencies interpret the term in different ways. Furthermore, the mapping indicated that there are agreements between several Swedish PSBs and undertakings that may be regarded ”exclusive”, since the PSB in question is either contractually or de facto prohibited from entering a similar agreement with another undertaking.

Given the high potential for confusion to arise in practice, there is clear motivation to define the term ”exclusive rights” as it appears in the PSI Directive and has been implemented by the Swedish legislator. The SCA has therefore requested clarification on how to interpret this term ”exclusive”. This in particular with regards to (i) when exclusive arrangements differ from licence agreements; (ii) the scope of exclusive rights (concerning the number of exclusive rights holders; can there only be one or more?); and (iii) the nature of exclusive rights (do these include rights granted via tender procedures?).

Addressing the questions posed, we have applied a logical methodology: starting with a brief introduction to the relevant parts of the Directive and the PSI Act in paragraph 4.2, we will first of all look at the interaction between exclusivity,

[98] Kartläggning av exklusiva rätter, 2010:21, Statskontoret.

licensing and non-discrimination provisions in paragraph 4.3. Then, focusing on the exclusive arrangements issues, we will look into the relevant provisions in the Directive and the transposition into Swedish law (paragraph 4.4), in particular at the intentions of the Swedish legislator: did it want to implement the Directive "one on one", or did it want to go further? Next, to complete our assessment of the scope of the problem, we will look at the state of play in other Member States to see if they too have had difficulties interpreting the term "exclusive right" and whether they could serve as a source of inspiration (paragraph 4.5). Subsequently, we will dig deeper into the PSI Directive, starting with the supporting statement made by the European Commission in 2009 (paragraph 4.6). From this, we will put this issue in the context of EU competition law (paragraph 4.7) and the nature of the grant (can it be via a tender procedure?) will be looked into in paragraph 4.8. Finally, in paragraph 4.9, we wrap up the main conclusions.

4.2 Relevant Provisions of the PSI Directive and the Swedish PSI Act

The relevant provisions from the various sources for our examination of exclusive rights and licensing arrangements are laid out in the following table. The colours indicate the transpositions.

PSI Directive		Swedish PSI Act	
Swedish version	*English version*	*English translation, bjorn, please check*	*Swedish text*
Art 8(1) Offentliga myndigheter får tillåta vidareutnyttjande av handlingar utan att ställa villkor eller får ställa villkor som omfattar relevanta frågor, när så är lämpligt genom en licens. Sådana villkor får inte i onödan begränsa möjligheterna till vidareutnyttjande och får inte användas för att begränsa konkurrensen.	Art 8(1) Public sector bodies may allow for re-use of documents without conditions or may impose conditions, where appropriate through a licence, dealing with relevant issues. These conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.	§ 1 The Act contains provisions aimed towards preventing public sector bodies from setting such terms regarding the re-use of documents that might restrict competition.	§ 1 Lagen innehåller bestämmelser som avser att förhindra att myndigheter beslutar om sådana villkor för hur handlingar får användas som begränsar konkurrensen.
Art 10(1) Alla gällande villkor för vidareutnyttjande av handlingar skall vara icke-diskriminerande för jämförbara kategorier av vidareutnyttjande.	Art 10(1) Any applicable conditions for the re-use of documents shall be non-discriminatory for comparable categories of re-use..	§ 8 Conditions for re-use should be relevant and non-discriminatory for comparable categories of re-use. The conditions shall not unnecessarily restrict possibilities for re-use. 9 § If a PSB re-use documents in its business activity, the same fees and conditions shall apply for the supply of the documents as for other re-users.	8 § Villkor för vidareutnyttjande ska vara relevanta och icke-diskriminerande för jämförbara kategorier av vidareutnyttjande. Villkoren får inte i onödan begränsa möjligheterna till vidareutnyttjande. 9 § Om en myndighet vidareutnyttjar handlingar i sin affärsverksamhet ska samma avgifter och andra villkor för tillhandahållande av handlingarna tillämpas för denna verksamhet som för andra som vidareutnyttjar handlingar.

Art 11 1. Alla potentiella marknadsaktörer skall kunna vidareutnyttja handlingar, även om en eller flera marknadsaktörer redan utnyttjar förädlade produkter som bygger på dessa handlingar. Kontrakt eller andra avtal mellan de offentliga myndigheter hos vilka handlingarna finns och tredje man får inte innehålla något beviljande av ensamrätt. 2. Om en ensamrätt emellertid bedöms vara nödvändig för tillhandahållandet av en tjänst av allmänt intresse, skall giltigheten av skälet till att en sådan ensamrätt medges prövas regelbundet och under alla omständigheter vart tredje år. De exklusiva avtal som ingås efter det att detta direktiv har trätt i kraft skall vara öppna för insyn och göras tillgängliga för allmänheten. 3. Befintliga exklusiva avtal som inte omfattas av undantaget i punkt 2 skall upphöra att gälla när kontraktet löper ut eller under alla omständigheter senast den 31 december 2008.	Art 11 1. The re-use of documents shall be open to all potential actors in the market, even if one or more market players already exploit added-value products based on these documents. Contracts or other arrangements between the public sector bodies holding the documents and third parties shall not grant exclusive rights. 2. However, where an exclusive right is necessary for the provision of a service in the public interest, the validity of the reason for granting such an exclusive right shall be subject to regular review, and shall, in any event, be reviewed every three years. The exclusive arrangements established after the entry into force of this Directive shall be transparent and made public. 3. Existing exclusive arrangements that do not qualify for the exception under paragraph 2 shall be terminated at the end of the contract or in any case not later than 31 December 2008.	10 § A PSB shall not grant an exclusive right to re-use documents, except when necessary to provide a service of general interest. Such exclusive right may be granted for a period not exceeding three years at a time. The exclusive right shall be made public.	10 § En myndighet får inte bevilja någon en exklusiv rätt att vidareutnyttja handlingar, utom när det är nödvändigt för att tillhandahålla en tjänst av allmänt intresse. En sådan exklusiv rätt får beviljas för en tid av högst tre år i taget. Den exklusiva rätten ska offentliggöras.

First and foremost, as was explored in the previous sections, it is clear the preservation of competition is a strong driving force behind the PSI Directive. This is also clear from its Art 8 which provides that licence conditions shall not restrict competition. Given the importance of competition law in the Directive, the Swedish legislator has given this prominence by referring to competition in section 1 of the Act, laying this down as a clear principle.

Furthermore, from the above comparison of the relevant provisions, it becomes clear that the Swedish legislator has chosen to implement Arts 8 and 10 of the Directive (on licensing and non-discrimination) jointly into section 8 of the Swedish PSI Act.

4.3 Interaction between exclusivity, licensing and non-discrimination provisions

The PSI Directive contains provisions relating to licensing (Art 8), non-discrimination (Art 10) and exclusive rights (Art 11), corresponding to section 8 and 10 of the Swedish Act. As a primary step, this chapter will seek to clarify the interaction between Arts 8 and 10 (section 8) on the one hand and Art 11 (section 10) on the other hand. Looking at differences between them as well as potential areas where these provisions overlap.

4.3.1 The Provisions on Licensing

Art 8(1) of the PSI Directive allows PSBs to decide to impose conditions relating to the re-use of documents held by them. Equally, a PSB is free to choose not to impose such conditions. Where conditions are imposed, these can be applied via a licence[99]. Although no common definition exists, a licence is generally a form of agreement whereby a licensor grants permission to authorise a use (such as copying software or using a (patented) invention) to a licensee, sparing the licensee from a claim of infringement brought by the licensor. A license under intellectual property rights commonly has several component parts beyond the grant itself, including a term, territory, renewal provisions, and other limitations deemed vital to the licensor.

While in private sector relations license agreements may often have an exclusive character, for instance the right of a distributor to exclusively service a certain area, the PSI Directive forbids this as the licence terms for PSI re-use contracts need to be fair and transparent and should not unnecessarily restrict possibilities for re-use or

[99] A MS may choose to apply conditions but not use a licence. This is also permitted under the PSI Directive; "*where appropriate through a licence*".

competition[100]. Therefore, the grant of a license to one party should not interfere with or restrict the grant of a second, third or hundredth license.

4.3.2 Distinguishing exclusivity provisions from licensing provisions

In the PSI Directive, there is an interaction between Arts 8 (licensing), 10 (non-discrimination) and 11 (exclusive rights). Art 8 allows for and encourages licensing, but this must be within the contours set down by Art 10. On this basis, it is entirely understandable why the Swedish legislator chose to incorporate these provisions together into section 8 of the PSI Act.

However, it is also important to note that in prohibiting exclusive rights, Art 11 (section 10 PSI Act) is essentially a very specific form of non-discrimination clause. In this sense, the non-discrimination clause in Art 10 of the PSI Directive interacts with both the provisions on licensing and on exclusive rights. This raises the possibility that a situation may arise where licensing conditions set by a PSIH are so restrictive that they in fact lead to a situation of *de facto* exclusivity.

> Suppose a PSB allows for re-use of its PSI, but subject to licensing conditions as permitted by Art 8 of the Directive. However, without breaching the obligation not to discriminate under Art 10 of the Directive, the licensing conditions it imposes are very difficult to meet: for example, the re-user must meet qualifications related to turnover or ICT infrastructure. This can mean that only a closed category of re-users can actually avail itself of the PSI for re-use. Ultimately, this could be regarded as the grant of an exclusive right as it severely limits the possibilities for re-use by others who cannot fulfill the licensing conditions.

In effect, the interaction between Arts 8, 10 and 11 of the PSI Directive (and section. 8 and 10 of the PSI Act respectively) can be seen as a continuum. Licensing arrangements are encouraged by the PSI Directive, but these too may become so severe in the conditions they impose that they merge into a type of de facto exclusive right by creating a limited, closed class of licensees.

Now that we have established that there is an interaction between licensing and the granting of exclusive rights, and that in some cases this may lead to an overlap between their respective provisions, we can also take a look at the features which distinguish Arts 8 and 10 from Art 11 of the Directive (and sections 8 and 10 of the PSI Act respectively). These centre on four issues relating to the scope, standing, effects and burden of proof.

Scope of the provisions

Under Arts 8 and 10 of the Directive, licences must not restrict competition and must not discriminate, thus limiting their scope to *contracts*. The ban of Art 11 goes

[100] Art 8(1), second sentence.

much further: it catches basically *any* PSB conduct (any arrangement) that leads to exclusion. As a consequence, Art 11 also catches arrangements such as refusals to supply, which effectively lead to situations of exclusivity arising: there is no need for an agreement between a PSB and a third party. In certain situations, it is therefore enough for the behaviour of the parties to lead to a *de facto* exclusive arrangement. The same applies *mutatis mutandis* to the implementation in Sweden under section 10 of the PSI Act.

Standing to question the arrangement

Arts 8 and 10 of the PSI Directive, as implemented in section 8 of the PSI Act, allow for a re-user in a contractual relationship with the PSB to question the arrangement to which *they* are party. In other words, to question licensing conditions, a third party must have standing. Conversely, under Art 11 (and section 10 of the Act), the third party in question may pursue an action against *any situation* where licensing conditions between a PSB and a re-user have an exclusive character.

Burden of proof for proving an infringement

Art 11 effectively sets down a rule, an exception and an enforcement measure. The rule lays down that exclusive rights are prohibited, but this may be overcome if the PSB is able to prove that the exclusivity is necessary to provide a service in the public interest. Therefore, the burden of proof is relatively low since the sheer existence of an exclusive right is enough to lead to termination, unless the PSB has good arguments.

On the other hand, the burden of proof to show that discriminatory terms exist as part of a licensing agreement is significantly higher. It is necessary to prove that there is a restriction of competition, in line with European or national competition rules. In the context of licensing, it should be noted that the PSB may be able to defend its seemingly discriminatory behaviour by showing that the categories of re-users are not comparable (Art 10(1) of the Directive).

Effects of infringement

The above difference is also reflected in the treatment of discriminatory or anti-competitive licensing conditions as opposed to exclusive arrangements. The latter are prohibited by the Directive, unless justified to provide a service in the public interest, and will be deemed automatically null and void. In such situations, it is as if the arrangement had never existed, with the effect that the third party has a right to redress.

In contrast, the effects of a finding that a licensing condition is discriminatory or anti-competitive is not laid down by the PSI Directive, nor by the Swedish Act. This will most likely be dealt with under general competition law at either national or European level. Sections 8 and 10 of the Act are given effect through the Swedish

Competition Act (SFS 2008:579), in which chapter 3 section 27 stipulates that a procedure used by a PSB in its sales activity may be prohibited if distorting or obstructing competition, or if meant to do so. A certain sales activity may also be prohibited all together, provided that it is not in accordance with law.

If not caught by this or other provisions in the Competition Act, it is possible that the Directive will be given direct effect in the sense that a breach of section 10 in the Act on exclusive rights will render the exclusive right to be void and null.[101]

4.4 The Provisions Prohibiting Exclusive Rights

4.4.1 Art 11 of the PSI Directive

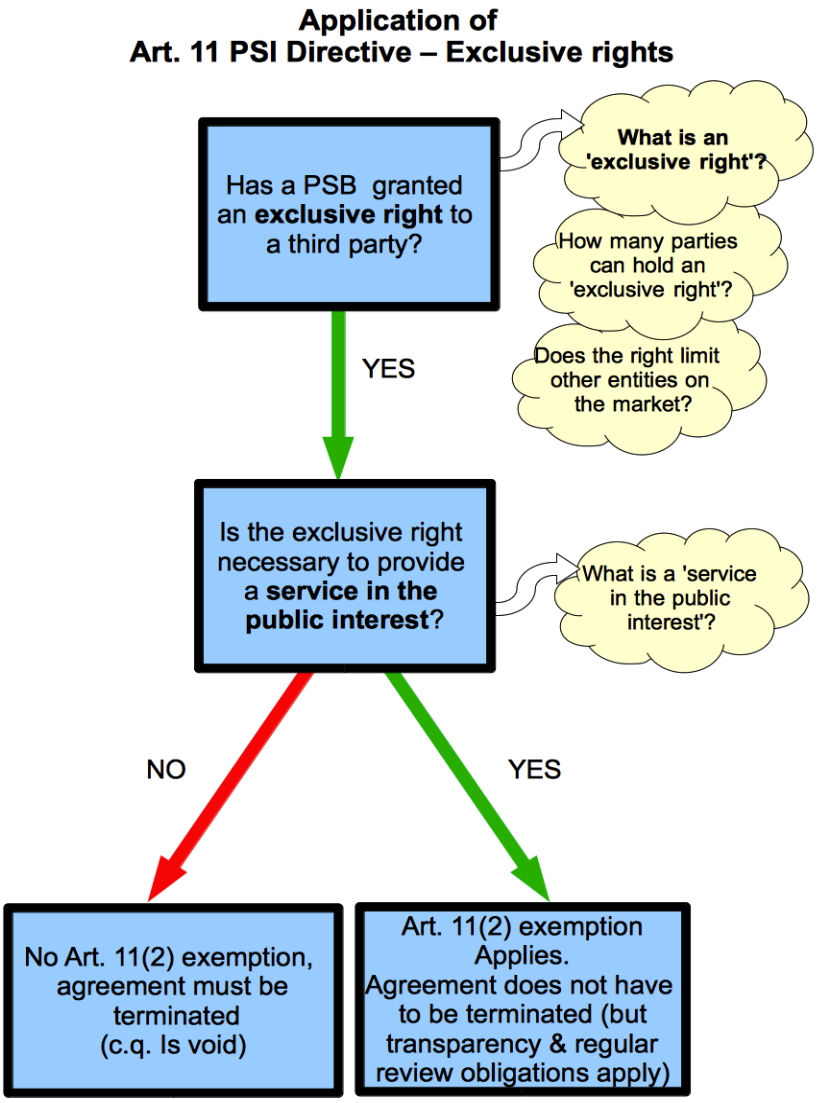
Now that we have looked at the connection between licensing conditions, non-discrimination and exclusive rights, we will move on to the core of this chapter: uncovering the meaning of the term ”exclusive right”.

Art 11 of the PSI Directive holds that PSBs may not assign exclusive rights for the re-use of documents in their possession that limit possibilities for other third parties to use the information. Art 11(2) provides for a limited exception from the prohibition of exclusive arrangements. By application of Art 11(3), all exclusive arrangements had to be terminated by 31st December 2008, unless they can be found subject to an Art 11(2) exception. The PSI Directive does not contain a definition of the term ”exclusive right.” This has created difficulties for Sweden, as well as other Member States[102] trying to implement this provision into their own national legal systems.

The issues raised by the SCA can be shown clearly in the chart below:

[101] However, this question is not without controversy. Furthermore, vertical direct effect would also implicate the application of Art 10(3) on termination of already existing arrangements.

[102] Throughout this document, references will be made to the interpretations of ”exclusive rights” in other MS. In the context of this report, Denmark, Finland, France, the Netherlands and the UK have been evaluated in detail, although other implementations of interest can also be noted. Detailed information on the findings in these MS are contained in Annex 2.



As seen above, the PSI Directive does not prohibit public sector bodies from making the information they hold subject to licensing conditions, provided that these do not unnecessarily restrict possibilities for re-use or restrict competition (Art 8(1)). In that context, Art 11 provides that PSBs may not assign exclusive rights – through contracts or other arrangements, the Directive seems to use these terms in a rather loose manner – for the re-use of documents in their possession which limit possibilities for other parties to use the PSI.

It is important to note from the outset that Art 11 only applies to the grant of downstream rights i.e. where the grant of the exclusive right is the subsequent step in the value chain. An arrangement whereby a third party helps a PSB with the sourcing of its PSI would not be a situation to which Art 11 would apply.

> An example hereof would be the land measurement activities that are undertaken by national Cadastres. Quite often these activities are outsourced

> to private sector parties, which deliver the measurements to the Cadastre under service contracts.

Art 11(2) provides for a limited exception from the prohibition of exclusive arrangements. The application of this provision means that there is a scope for exclusive agreements to continue to exist and to be granted in future only where they are required to fulfil a "service in the public interest." This Article should be read in conjunction with recital 20 of the PSI Directive, which further elaborates that:

> "Public sector bodies should respect competition rules when establishing the principles for re-use of documents avoiding as far as possible exclusive agreements between themselves and private partners. However, in order to provide **a service of general economic interest**, an exclusive right to re-use specific public sector documents may sometimes be necessary. This may be the case if no commercial publisher would publish the information without such an exclusive right."

In this recital, it can be noted that a different term appears, in comparison with Art 11: that of "services of general economic interest" (SGEI). The differences between these terms are examined below in paragraph 6, however it appears likely that they should be either read with the same scope or that the term appearing in the article should be more general in nature. This is consistent with the approach at European level, which usually prefers to avoid using this term and favouring the more concrete SGEI as well as with the aims of the Directive itself[103].

By application of Art 11(3) of the Directive, all exclusive arrangements had to be terminated by 31 December 2008, unless they can be found subject to an Art 11(2) exception.

4.4.2 The Swedish Implementation: Section 10 of the PSI Act

Now that we have laid the groundwork for our investigation into exclusive rights at European level, we will dig into the (preparatory works for the) Swedish implementation of Art 11, to see whether we can get any clues on the interpretation of the term "exclusive."

Before the enactment of the PSI Act, there was no provision in Swedish legislation that corresponded to Art 11 of the Directive[104]. Therefore, a provision regarding exclusive rights was incorporated in the PSI Act to meet the requirements of the Directive, cf. section 10.

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[103] Commission of the European Communities, *Communication on the Review of the PSI Directive* notes that: "The term public task is closely related to public services or services in the general economic interest, and is in some languages interchangeable (e.g. mission de service public in French). The ECJ has examined on a case by case basis whether certain activities in the MS can be considered to be such services and set certain criteria, such as the universality and continuity of the service, uniform tariff rates and equal terms."

[104] Prop. 2009/10:175, p. 171.

Section 8 of the PSI Act was derived from Arts 8 and 10(1) of the PSI Directive and stipulates that the terms for re-use should be relevant, non-discriminatory and may not unnecessarily limit the possibility of re-use. In the preparatory works to section 8, the Swedish legislator did not seem to limit the scope of the section to the bilateral affect between the PSB and the re-user[105]. Whether this would imply that a covenant unnecessarily restricting the re-use, by stipulating the equivalent to special rights, or that a right to re-use a defined data may only be granted to a limit number of, for example, licensees, would infringe section 8 cannot be held as inconceivable.

When discussing exclusive rights, the Swedish Ministry of Finance in its preparatory works to the PSI Act used the term exclusive rights in the meaning of a sole right granted by a PSB to one undertaking (Swe *ensamrätt*). An explanation as to why the term ”exclusive right” was recognised to be a sole right was not given. However, the linguistic understanding of the word ”exclusive” probably pointed the authors in this direction.

In the final preparatory work of the PSI Act, the Government noted that the Ministry of Finance used the term ”exclusive right” in the meaning of a sole right[106]. The Government, also made a reference to Art 106 TFEU, and more specifically to the stipulation of ”exclusive rights” mentioned therein. However, Art 106 TFEU distinguishes between ”special rights” and ”exclusive rights” (see section 4.3.4 below). The Government did not elaborate on the interconnection between Art 106 TFEU and Art 11 of the Directive, and followed the interpretation by the Ministry of Finance that PSBs according to Art 11 should not grant sole rights. They did, however, use the term ”exclusive right” (Swe *exklusiv rätt)* instead of sole right.[107]

From the preparatory works, it is clear that the Swedish legislator did not intend to deviate from the PSI Directive on this point, meaning that the term ”exclusive rights” in the PSI Act should correspond with the term ”exclusive right” in the Directive. Thus, in comparison to the purposeful use of ”business activity” instead of ”outside public task,” as discussed supra, the legislator did seem to have intended there to be any difference in scope and meaning between ”exclusive rights” in the PSI Act and those in the PSI Directive.

Stating this, the legislator, seemed nonetheless to have understood the words ”exclusive right” as being one or a sole right, insinuating thereby that the Directive also meant it as such. However, without any explicit definition to this effect in the Directive itself, the intentions of the European legislator too are uncertain. A possible explanation as to why the Swedish legislator chose to implement Art 11 by using the identical term as the Directive might be that the legislator was aware that

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[105] Instead it stated i.a. that both Swedish and EU competition law may become applicable., cf. Prop. 2009/10:175, p. 166 et seq.

[106] Prop. 2009/10:175, p. 170.

[107] Prop. 2009/10:175, p. 170 et seq.

the term was not unproblematic. As mentioned, the government issued a mapping of exclusive rights in March 2010 to gain understanding of the interpretation in practice and the findings confirm that the meaning of the term is indeed unclear.[108]

The use of the same wording and looking at the apparent intention of the Swedish legislator to follow Art 11 of the PSI Directive, means that if it is possible to find a definition of ”exclusive rights” based on the aims and intentions of the PSI Directive then this can also be applied to section 10 of the Swedish PSI Act. Additionally, the principle of ”interprétation conforme” ensures that national courts interpret national law in the light of the wording and the purpose of the Directive, in order to achieve the result referred to in the specific article[109].

Therefore, further guidance must be sought in the Directive and the EU regulation.

4.5 Implementation and Application in Other Member States

Where normally national legislators throughout Europe should have been grappling with this issue (as well), we have looked into the implementation of Art 11 of the Directive in a large number of other Member States. Surprisingly, it appears that this has not been the case. Below we highlight the main findings and more detailed information hereon has been included in Annex 2.

In particular we have looked into the work undertaken in Member States in the framework of the so called ”exclusive arrangements studies” (EA studies) which were initiated by the EC in 2009 and 2010[110].

Implementation Example : France[111]:

The French implementation does not explicitly refer to exclusive agreements as being only grants to one entity. The wording of the law is inconclusive on this issue.

The questionnaire for the French EA study asks: “What is **the** name of the organisation or business with which you have concluded this exclusive agreement[112]?” (Indicating **one** entity only)

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[108] Kartläggning av exklusiva rätter 2010:21, Statskontoret.

[109] C-14/83, Von Colson, 1984.

[110] See http://www.epsiplus.net/news/news/psi_exclusive_arrangement_studies_launched. The nine countries covered were; Austria, Belgium, the Czech Republic, Denmark, France, Germany, Italy, Poland and Spain. Only two countries (the UK and the Netherlands) took action before the deadline for ”phasing out” of exclusive agreements on 31st December 2010. The final reports, including those of the UK and Netherlands, can be found at: http://ec.europa.eu/information_society/policy/psi/facilitating_reuse/exlusive_agreements/index_en.htm.

[111] The French law of 1978 implements the PSI Directive.

The EA study, paraphrases Art 14 of the French implementing Act as including "any EAs … *concluded between **two** "authorities listed in Article 1" of the [law].*" However, it is worth restating that apart from the usage of the singular ("an" exclusive agreement), this reference to only two entities is not present in the law itself.

Guidance issued by the French Agency for Immaterial Property of the State[113] says that where granting an exclusive right would permit the PSB to carry out its mission in the public task more easily, it may confer the exclusive exploitation of information on a "**single beneficiary"**[114].

Implementation Example: The UK[115]:

Exclusive arrangements are defined in the implementing PSI Regulations as "*a contract or other arrangement granting an exclusive right to re-use a document*.[116]" Unfortunately the Regulations nor their Explanatory Memorandum provide insight into the scope or nature of these rights

Guidance by UK Regulator (OPSI) in the first review of EAs (2008) lays down example situations of where "exclusive rights" may exist.[117] This list explicitly mentions grants to **one** person or organisation. However, from the surrounding context it appears that this list is not intended to be comprehensive.

An OPSI Guidance Note[118] also mentions grants to one person or organisation. With this reference, it seems to hint at concerns about monopoly. However, it goes on to describe more general competition law concerns, which would indicate situations where two third parties are granted an exclusive right for re-use of certain information should not be dismissed simply because they are not strictly "monopoly".

Thus, without a solid definition in any MS investigated, it is difficult to determine if the references made within national frameworks which indicate the singular were the consequence of an assumption based on Art 106 terminology (that "exclusive" =

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[112] See *Etude d"identification des accords signés dans le cadre de la réutilisation des données publiques*, available at http://193.251.13.192/etude_CE_prada/form_etude_CE_prada_v2.htm "7. Quel est le nom de l"organisme/entreprise avec qui vous avez conclu cet accord d"exclusivité?"

[113] Agence du patrimoine immatériel de l"Etat, *Cahier pratique "Le droit à la réutilisation des informations publiques Foire aux questions*", April 2010.

[114] At Point 3.3 : *" l"administration pourra considérer que, compte tenu des impératifs de sa mission de service public, elle peut confier l"exploitation exclusive de cette information à un seul bénéficiaire."*

[115] The 2005 PSI Regulations implement the PSI Directive in the UK.

[116] UK PSI Regulation, Regulation 14(6).

[117] OPSI Letter and Questionnaire, 13th August 2008, available to download at http://www.epsiplus.net/news/news/locating_exclusive_agreements.

[118] OPSI, *Public Sector Information Guidance Note 6: List of Exclusive Agreements* (undated) http://www.nationalarchives.gov.uk/documents/information-management/list-of-exclusive-arrangements.pdf.

sole right), or were down to the fact that it was simply not conceived that grants could be made to more than one entity which would have identical anti-competitive consequences.

Nevertheless, in the cases flagged out under EA studies there were no situations where exclusive rights are granted to more than *one* party. This may indicate that, even if a broad definition is used, the scale of the problem in practice is likely to be small. However, obviously, this does not answer the question posed by the SCA and we therefore now turn to the Directive in order to try and uncover the intention of the EU legislator. We will do so by first looking into a statement provided by the EC in the framework on the EA studies and assess its value and after that we will try to interpret the term by putting it into the context of EU competition law.

4.6 The 2009 Statement of the European Commission on ”Exclusive Arrangements”

4.6.1 Content of the Commission Supporting Statement

In December 2009, in support of the EA studies to be undertaken, the EC issued a statement on the meaning of the term ”exclusive arrangement” in Article 11 of the PSI Directive (hereafter the ”supporting statement”).[119] The statement sets out the following:

> “[E]xclusive rights should be interpreted as any restriction agreed, imposed or accepted by the public sector body in a contractual relationship with a market player with respect to the provision of information for the purpose of re-use, which limits its ability to grant re-use rights to the same information within the meaning of the Directive to other market players.”

It continues to elaborate that:

> “ Any possible specificity of the procedure resulting in the award of an exclusive right has no impact on the exclusive nature of such an agreement, e.g. an agreement remains exclusive even if such exclusivity is awarded on a single or a defined number of re-users as a result of a tender procedure.”[120]

Accordingly, there are two interesting aspects of this statement.

Firstly, regarding the scope of the term ”exclusive rights,” the Commission supporting statement is worded very broadly to cover any arrangement which limits the possibility for the PSB to grant further rights for the same information. It explicitly states that exclusive rights can be granted to one or more than one re-

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[119] Available online at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/other_activities/luis_presentation.pdf

[120] In this statement, as with the PSI Directive itself, the terms ”exclusive right” and ”exclusive agreement” are seemingly interchangeable.

user. This is important as it suggests that more than one entity can be subject to such an arrangement and it can still be defined as ”exclusive” and so not permitted by the Directive (subject to possible exemption on the basis of Art 11(2) PSI Directive).

Secondly, almost as an afterthought, this statement addresses questions with regards to the *nature* of the grant. In mentioning that rights granted via tender procedures would also be ”exclusive” for the purposes of Art 11, it is apparent that DG INFSO intends that a broad spectrum is covered.

4.6.2 Putting the Commission Supporting Statement into Context

Trying to grasp the meaning of the statement, it is important to note that it was made in the context of the EA studies referred to above, specifically to ensure that a full picture could be built within these Member States to give the Commission an overview of the (potential) exclusive agreements in existence. It is therefore logical that a statement on what constitutes an exclusive arrangement given in this context was to catch as many situations as is possible. If the Commission was to cast the net too shallow then it would run the risk of coming up empty. Such a strategy would clearly be ineffective for the purpose of assessing the extent to which exclusive arrangements still existed. Therefore, when considering the content of this statement and how much weight it should be given in this report, appreciating this context is essential.

Secondly, we also need to consider the status of the statement. In the footnote, it says:

> “Information herein provided does not necessarily reflect the opinion of the European Commission, nor does it replace consultation of the official sources quoted. Interpretation of Community law lies in the last instance with the European Court of Justice.”

Clearly, this underlines the weight it is to be given: it remains an advisory recommendation, which does not constitute a formal binding interpretation of the Commission.[121] However, it certainly gives us clues to continue with.

4.7 Exclusive Rights in the Context of EU Competition Law

Now that we have seen that the SE legislator appears to have opted for a one on one implementation, and given the supporting statement from the EC and the ”limited weight” it can be given (in comparison to formal pieces of EU legislation

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[121] See Weiler, J.H.H., *On the Grammar of EU Law: Legal Instruments*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 24-27 February 2003 : “*The Court consequently rejects the notion that the Commission has the power to make binding interpretations of agricultural regulations via informal statements.*”

or ECJ case law), we will further study clues inside the PSI Directive and the links with its main source of inspiration: European competition law.

4.7.1 Connection between Art 11 PSI Directive and Art 106 TFEU

Although the European involvement in information policy has only been "stepped up" in relatively recent years, dating as far back as 1989 we see the EC issuing Guidelines for improving the synergy between the public and private sectors in the information market.[122] Interestingly, this document already refers to terminating exclusive rights, stating that:

> "Contracts or other arrangements with private sector database providers or host services should not grant exclusive rights if they lead to distortion of competition. If, for reasons such as the penetration of a new market or provision of a service in the public interest, an exclusive right is deemed necessary, it should be subject to regular review[123]."

The European Commission's 1998 Green Paper on PSI[124] also points to the importance of free and open competition in relation to exclusive rights as reflected in the US Paperwork reduction Act, where it is not permitted (unless authorised by statute) to *"establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public.*[125]"

In the *Commission Proposal for a Directive on the re-use and commercial exploitation of public sector information* in June 2002 specific mention was made of Art (ex) 86 TEC (now Art 106 TEFU) in its explanation of Art 11 PSI Directive:

> "Article [11] limits the possibility for public sector bodies to have exclusive arrangements for the exploitation of public sector information, where the arrangements unjustifiably restrict competition or the commercial re-use of information. Indeed, to the extent that an exclusive arrangement would lead to an abuse of a dominant position by the undertaking that benefits from it and thereby to a violation of the competition rules of the EC Treaty (Article 82 in conjunction with Article 86), this Directive reflects the Treaty obligation of removing all unjustified exclusive arrangements.
>
> In some specific cases an exclusive arrangement may however be justified (Article 10.2 [now 11(2)]). Whether a situation justifies exclusivity, and thus whether it does not unjustifiably restrict competition, would be eventually decided on a case by case basis and in application of Article 86 of the Treaty."

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[122] Commission of the European Communities", *Guidelines for Improving the Synergy Between the Public and Private Sectors in the Information Market* (1989), available online at: http://europa.eu.int/information_society/policy/psi/docs/pdfs/1989_public_sector_guidelines_en.pdf.

[123] Commission of the European Communities, *Guidelines for improving the synergy between the public and private sectors in the information market* (1989), section 6.

[124] Commission of the European Communities, *Public Sector Information: A Key Resource for Europe*, Green Paper on Public Sector Information in the Information Society, COM (1998) 585.

[125] United States of America, 4.1.1995 Paperwork reduction Act, Section 3506, dealing with federal agency responsibilities.

This explicit reference to competition law and (ex) Art 86 makes clear that it was the main aim of Art 11 to remove anti-competitive restrictions on the market for information held by PSBs. However, throughout the rest of the preparatory process, the notion of exclusive rights is discussed very little. This is so much so, that in the final text of the Directive, Art 11 is almost word-for-word the same Article as was initially proposed by the Commission[126].

Unfortunately, the preparatory works still tell us little about the number of parties that can be granted rights which may be considered ”exclusive” or the nature of these rights. However, what the above statement does do is provide a strong link to Art 106 TFEU. Consequently, an examination of the term ”exclusive” in the context of the Treaty can prove useful and will be undertaken in the following section.

4.7.2 Meaning of term ”Exclusive Rights” in Art 106 TFEU

The basis for Art 106 TFEU is that public undertakings[127] and undertakings to which governments grant special rights to perform certain services may be seen as problematic from the perspective of the EU Treaties. Art 106 TFEU therefore acknowledges that in certain circumstances Member States will have to grant particular rights to undertakings so that they will provide certain services and Art 106(2) provides for a limited exception where the application of the Treaty rules would mean this task could not be performed under economically acceptable circumstances. These services are typically ones which no commercial operator would be interested in providing otherwise, and without these rights they would not be provided at all. The Treaty refers to such services as ”services of general economic interest” (SGEI).

However, the PSI Directive refers to two different terms; ”services of public interest” in Art 11(2) and SGEI in recital 20. Although no definition is provided for these terms in the Directive, we may analyse their scope by looking at other European sources:

Services in the public interest (Art 11 PSI Directive)	***Services in the general economic interest (SGEI)*** (Recital 20 of the PSI	***Services in the general interest (SGI)*** (Commission 2000

[126] One difference is that the original Commission proposal contained the addition *”… that constitute an unjustified restriction of competition or the re-use of the information*” at the end of (ex) Art 10(1). In the final Directive a reference to competition is instead found in recital 20. Also, in the final Art 11 (2), the wording has been made stronger so that it is only in cases where necessary for the provision of a service in the public interest that an exclusive right may be permitted. The original proposal was more general, referring to this only as an example (”*for reasons such as the provision of a service in the public interest*”). Additionally, a specific timeframe for termination of exclusive agreements was added by the Council as Art 11 (3); see Council *Common Position (EC) No 38/2003 adopted by the Council on 26 May 2003 with a view to adopting Directive 2003/. . ./EC of the European Parliament and of the Council of . . . on the re-use of public sector documents* (2003/C 159 E/01) , Section III, point 8.

[127] This term was defined by the ECJ in Cases 188-190/80 *France, Italy and the UK v Commission* [1982] ECR 2545, a main criteria being that the State can exert, directly or indirectly, a dominant influence. This finding has influenced the PSI Directive Art 2(2)(c) definition of a ”body governed by public law.”

	Directive Articles 14 ,106(2) and Protocol 26 TFEU , Art 36 of the Charter of Fundamental Rights)	Communication on SGEI Green and White Papers on SGI)
Mostly the Commission avoids use of this term and prefers to use the more concrete terms SGEI or SGI. Refer to requirements made by a PSB and imposed on the provider of the service to ensure certain public interest objectives are met.	SGEI are services which belong to the market, but to which other "non-market" values are applied. In case law, the Court has established that they *"exhibit special characteristics as compared with those of other economic activities."*[128] Are most commonly referred to in the context of the utilities sectors[129]	SGI is an "umbrella term[130]" taken to mean: *"Market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations[131]."* It is only SGEI which have been developed in Community law that are subject to the Treaty rules on competition and the internal market[132].

Although SGEI referred to in the recitals and Art 106 are seemingly different from "services in the public interest," it is pointed out in the recent review of the PSI Directive, the term that these terms are likely interchangeable[133]. In this sense, the deviation from common EU terminology should not be too deeply considered; it could simply be due to a slip of the pen. This point a given, the scope of the term "services in the public interest" is of little consequence for our investigation into the scope and nature of exclusive rights since it relates only to the scope of the exception permitted under Art 11(2).

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[128] Commission of the European Communities, *Green Paper on services of general interest* COM (2003) 270 Final of 21.5.2003, and *White Paper on services of general interest* COM (2004) 374 Final of 12.5.2004.

[129] In Corbeau the ECJ defined SGEI as existing where the service is provided to "*all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation.*". However, it must be emphasised that when stepping into the domain of information services, the need to rely on cross-subsidisation is much less, since once the initial investment has been made to produce a document there is very little cost invoiced in the actual dissemination. The principles of the information market are fundamentally different from many others, and most significantly from the utilities sector. The content of the PSI Directive must therefore be read in this light and the fundamentally different character of the information market necessitates the difference in scope between the two exceptions.

[130] Commission of the European Communities, *Green Paper on services of general interest* COM (2003) 270 Final of 21.5.2003, SGI are referred to when the Commission wishes to include non-economic services, or where a distinction between the economic or non-economic nature of the services is not required.

[131] Commission of the European Communities, *Green Paper on services of general interest* COM (2003) 270 Final of 21.5.2003, and *White Paper on services of general interest* COM (2004) 374 Final of 12.5.2004.

[132] See http://www.eurosig.eu/article109.html#nb5 .

[133] Commission of the European Communities, *Communication on the Review of the PSI Directive* (7 May 2009) COM(2009) 212 final.: "*The term public task is closely related to public services or services in the general economic interest, and is in some languages interchangeable (e.g. mission de service public in French). The ECJ has examined on a case by case basis whether certain activities in the MS can be considered to be such services and set certain criteria, such as the universality and continuity of the service, uniform tariff rates and equal terms.*"

4.7.3 Similarities between Art 106 TFEU and Art 11 PSI Directive allow for Comparisons

From the preparatory works there are clear indications that Art 106 was used as a point of reference for the PSI Directive. This can be backed up by the similarities which can be seen in the final version of the Directive, as the scheme below demonstrates.

	Art 106 TFEU	**Art 11 PSI Directive**
Rule	Art 106(1): Grant of excl*usive or special* rights by State	Art 11(1): Grant of *exclusive rights*
Exception	Art 106(2): Application of Treaty would obstruct performance of tasks entrusted to them to operate a SGEI or *revenue producing monopoly* Art 106(2): Application of Treaty would affect trade between MS and be contrary to interests of the Union.	Art 11(2): Necessary for *provision of service in the public interest* (Recital 20) PSBs shall respect competition rules as far as possible when concluding exclusive agreements (Recital 20) Where necessary to provide a SGEI, exclusivity may be necessary
Effect of Exception	Provisions of TFEU do not apply to agreement	Provisions of Art 11 do not apply to agreement BUT rest of PSI Directive still applies

4.7.4 The sticking Point: the Scope of ”Exclusive Rights” must differ

Although the above highlights similarities in terminology, layout and application, there is one significant difference between Art 106 TFEU and Art 11 PSI Directive: Art 106 refers to ”exclusive or special rights” whereas Art 11 of the PSI Directive only refers to ”exclusive rights”.[134]

In the context of Art 106, the terms special and exclusive rights are not synonymous[135]. Although initially treated as such by the European Courts, in *France*

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[134] The preparatory works for the actual PSI Directive do not make any reference to ”special” rights, however it is unclear whether this is intentional or if the Institutions (mistakenly) took it for granted that the terms were synonymous. One single mention is made in the ESC Opinion of the Commission Green Paper on PSI in the Information Society of January 1999, which refers to ”special or exclusive rights” (Opinion of the Economic and Social Committee on ”Public sector information: a key resource for Europe — Green Paper on public sector information in the information society” of 28 April 1999 1999/C 169/12, 16.6.1999). After this mention, the term ”special” does not appear again in any text.

[135] In *France v Commission* Case C-202/88 [1991] ECR I-1223, [1992] 5 CMLR 522, paras 31-47. See also C-271/90 etc Spain v Commission [1992] ECR I-5833, paras 32 and 34, the ECJ found that certain provisions requiring Member States to remove *special* rights were void insofar as the Telecommunications Directive (Commission Directive 94/46 amending Directive 88/301 and Directive 90/388 in particular with regard to satellite communications OJ 1994 L268/15, recital 11) had failed to specify which rights were ”special” or why they were incompatible with the EC Treaty. This finding was followed by another on a similar note, where A-G-Jacobs found that in order for rights to be ”special”, they must be granted to one or more, but nevertheless a limited class of undertakings, which are

v Commission[136],the ECJ explicitly showed that there is a distinction between special and exclusive rights[137]. The most recent version of the Telecommunications Directive includes a definition of ”special rights” in its Art 1 (4):

> “ "[S]pecial rights" means rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area:
>
> (a) limits to two or more the number of such undertakings, otherwise than according to objective, proportional and non-discriminatory criteria; or
>
> (b) designates, otherwise than according to the criteria referred to in point (a), several competing undertakings; or
>
> (c) confers on any undertaking or undertakings, otherwise than according to the criteria referred to in points (a) and (b), any legal or regulatory advantages which substantially affect the ability of any other undertaking to import, market, connect, bring into service and/or maintain telecommunication terminal equipment in the same geographical area under substantially equivalent conditions.[138]”

The definition given in the amended Telecommunications Directive is presumed to be transferable to other areas[139], and elements of it can be seen appearing in other sectors. For example, this definition of ”special” rights also appears in the Financial Transparency Directive[140], which additionally contains a definition of exclusive rights. Exclusive rights are defined therein as:

> “[R]ights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area[141].”

The Swedish Act on Certain Financial Links (SFS 2005:590) is based on the Transparency Directive. The purpose of the Directive and the Act is to enable the Commission to control that undertakings are not given state aid or other benefits in violation with EU competition rules for undertakings and states[142].

Section 4 of the Swedish Act on Certain Financial Links stipulates separate accounts need to be kept for different activities. The provision furthermore states that an

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selected in a discriminatory and subjective manner by the MS, as cited in Ivo Van Bael, Van Bael & Bellis *Competition law of the European Community*, (Kluwer Law International, 2005), p. 992.

[136] Idem. This ECJ decision led to the amendment of the Telecommunications Directive.

[137] The original Telecommunications Directive contained a definition in its recital 11. However, this was subsequently repealed in 2008 by the new Directive which now contains a definition of special rights in its Articles.

[138] Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment, Art 1(4).

[139] See Jones, A. and Sufrin, B., EC Competition Law (Oxford, OUP, 2008) p. 628.

[140] Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial regulations between Member States and public undertakings, Art 2 (1) (g).

[141] Ibid, Art 2(1)(f).

[142] Prop. 2004/05:140, p. 15-16.

undertaking that has been granted exclusive or special rights is obliged to follow the rules of the Act. Paragraph 3 contains definitions of ”exclusive rights” and ”special rights”. The terms are defined in the same manner as in the Transparency Directive[143].Thus:

- ”Exclusive rights” are defined as rights granted by a Member State to one undertaking within a given geographical area[144].
- Special rights” are defined as rights granted by a Member State to a limited number of undertakings within a given geographical area, by limitation to two or more number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, or designation of several competing undertakings as being authorized to provide a service or undertake an activity, or confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions[145]. In other words, ”special rights” are regulations and authorisations that favour certain undertakings over others in a disproportionate manner.[146]

The term ”special rights” excludes rights that are granted on objective, proportional and non-discriminatory criteria. Examples of such rights are competitively neutral conditions in public procurement or granting of licenses and other business authorisations[147].

On the basis of the above, it is normally the case that ”*exclusive rights”* will be found to exist where a **monopoly** has been granted by the State to **one entity** to engage in a particular economic activity on an exclusive basis[148]. One single European case from 2000 has found exclusive rights to be granted to more than one undertaking[149]. However, this case has not been given any weight and has been dismissed as a likely slip of the tongue, since the Court then goes on to talk of ”special or exclusive rights[150]”. On the same note, ”*Special rights”* will be found where rights are given by the State to **a limited number** of undertakings chosen in a subjective and discretionary manner[151].

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[143] Prop. 2004/05:140, p. 36.

[144] Also Directive 2000/52/EC, Article 2 (f).

[145] Also Directive 2000/52/EC, Article 2(g).

[146] Prop. 2004/05:140, p. 19.

[147] Prop. 2004/05:140, p. 85.

[148] Jones, A. and Sufrin, B., *EC Competition Law* (Oxford, OUP, 2008), p.544.

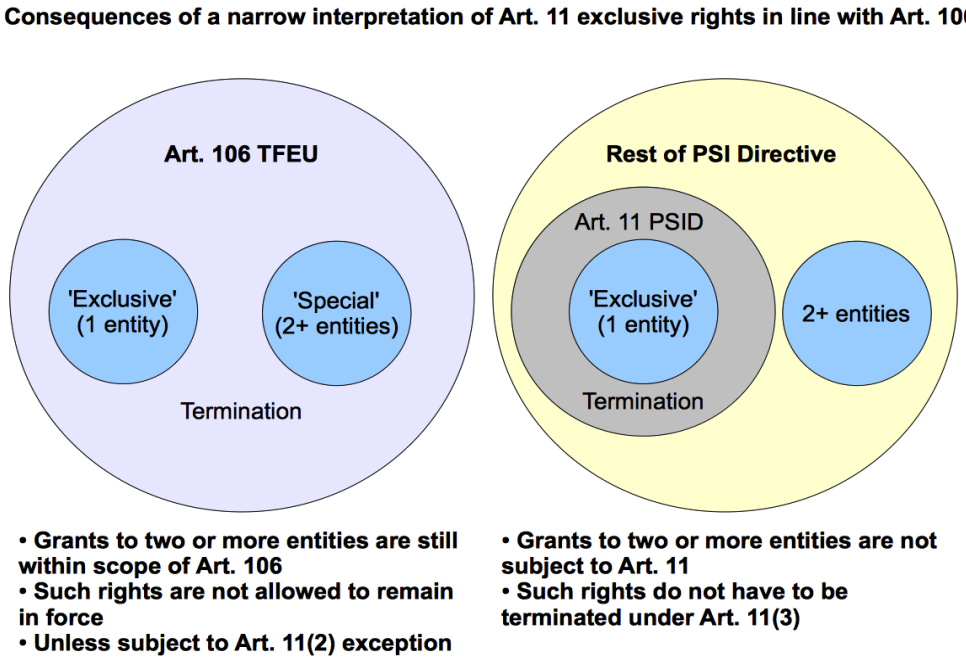
[149] C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune*, [2000] ECR I-03743

[150] Idem, at para. 54 ”*It follows that those three undertakings must be regarded as undertakings to which the Member State concerned has granted an exclusive right within the meaning of Article 90(1).*” This case is mentioned in Whish, R., Competition law, (Oxford, OUP, 2008), at p. 222, but is not given much weight since the Court ”*did not explain why the rights conferred were exclusive rather than special which would have been a more natural finding*.”

[151] Jones, A. and Sufrin, B. *EC Competition Law* (Oxford: Oxford University Press, 2008).

4.7.5 A narrow Interpretation Contradicts the Aims of Art 11

From the previous sections, it can be concluded that (a) the preparatory works to the PSI Directive mentioned Art 106 specifically (b) there are similarities between Art106 TFEU and Art 11 of the PSI Directive and (c) the distinction between ”special” and ”exclusive” rights in Art 106 is explicit and acknowledged. Accordingly, it would seem logical to export the meaning of ”exclusive” to Art 11 of the PSI Directive, implying that the ban on exclusive rights would be limited to those granted to one undertaking. These consequences are captured in the scheme below.



Obviously, when applying such interpretation *per analogiam* we need to assess what the consequences are and whether these consequences are in line with the intentions of the legislator of the PSI Directive. When we look back at Art11(1) it sets out:

> ”The re-use of documents shall be open to all potential actors in the market, even if one or more market players already exploit added-value products based on these documents.”

This provision aims at maximising re-use, and alongside Art 11(3) it is the clear intention of the legislator to bring all restrictions which limit potential actors from re-using information to an end (unless permitted by the Art 11(2) exception). The narrow interpretation via 106 TFEU would mean that grants of rights to two or more entities are not ”exclusive” and do not have to be terminated under Art 11(3). Obviously, this does not sit well with the aim of Art 11, since such grants could be just as restrictive of competition as those involving monopoly rights.

Furthermore, the consequence of a narrow interpretation of ”exclusive” in the PSI Directive is much greater than within Art 106 TFEU. This is because in Art 106 and the Directives mentioned above, if a grant is not ”exclusive” then it can still be caught as ”special” and would not escape application of competition rules. This is not the case for the PSI Directive; if a grant of rights is made to two or more undertakings, then using this narrow definition would mean that it is not within the scope of Art 11 and would not have to be terminated, even if it was not providing a service in the public interest.

Nevertheless, even though transferring the terminology of Art 106 may be tempting given the similarities between the two provisions, such a narrow interpretation would deprive Art 11 of one of its main teeth; prohibiting rights granted to a limited number of re-users which limit potential re-use. To allow grants to more than one, but still a limited number of re-users would be permitted would not only be damaging since it would go against the main aim of Art 11 (to open up potential re-use to all), but is also out of line with the logic of the Directive as a whole. The PSI Directive is based strongly on competition law principles, and to allow such situations to remain would not help increase the competitiveness of the European information market as it ought to.

It is therefore concluded that ”exclusive rights” under Art 11 of the Directive should not be limited to grants of rights to one single re-user only. In this sense, the term should not be limited to the definition given in the context of Art 106 TFEU, but should instead take on a broader meaning encompassing also grants to more than one, but nonetheless a limited number, of undertakings. Applying a teleological approach, this interpretation is consistent with the overall aims of the Directive.

4.8 The Nature of the Grant; is It Relevant?

4.8.1 Treatment of Tender Procedures in the Public Procurement Directives

Irrespective of the conclusion of the previous paragraph, obviously Art 106 can still be used as a comparator to address the next question of the SCA, being how the nature of the grant affects the categorisation of a right.

It will be recalled that the Commission supporting statement says:

> “ Any possible specificity of the procedure resulting in the award of an exclusive right has no impact on the exclusive nature of such an agreement, e.g. an agreement remains exclusive even if such exclusivity is awarded on a single or a defined number of re-users as a result of a tender procedure.”

Accordingly, this statement appears to bring exclusive rights and even special rights granted via tender procedures under the ban of Art 11 of the PSI Directive.

According to Art 3. of the Public Procurement Directive[152]:

> "where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality."

The mentioned rule was implemented almost word-by-word in chapter 1 section 12 of the Swedish Public Procurement Act (SFS 2007:1091).

In light of the above, the Commission's supporting statement is given another tone. The Commission might be referring to Art 3 of the Public Procurement Directive, that in turn actually concerns also special rights. Thus, this gives some support to interpret also Art 11 of the PSI Directive as including a prohibition to grant several rights, e.g. to have a few but limited number of licensees.

However, the question must be asked whether the Commission was right in its statement, since it does appear to be inconsistent with established practice in the context of Art 106 TFEU and other Directives.

In its judgment of 12 December 1996[153], the ECJ interpreted the terms "special" or "exclusive" rights in the Telecommunications Directive taken together as meaning:

> "rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide or operate telecommunications networks or to provide telecommunications services in the same geographical area under substantially equivalent conditions."

Subsequent to the judgment of the ECJ above relating to the Telecommunications Directive, the Commission undertook[154] to amend the Utilities Directive in order to achieve consistency[155] With regards to the nature of the special or exclusive rights, recital 25 of the new Directive lays down that:

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[152] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[153] Case C-302/94, *The Queen v. Secretary of State for Trade and Industry, ex parte British Telecommunications plc*, ECR 1996 I-8417.

[154] Commission of the European Communities, *Communication to clarify the classification of "special" rights in the Telecommunications Directive*, the European Commission went on to say that: "*It is true that the Judgment interprets the concept of "special or exclusive rights" only with regard to the Telecommunications Directives concerned, and this interpretation cannot be applied to the definition of such rights in other Directives if their text clearly shows that the Community legislator explicitly intended to give this concept a different scope, or where the legislative context of the definition is different*."

[155] Commission of the European Communities, *Explanatory Note on the Utilities Directive Definition of Exclusive or Special Rights*. This document corresponds to Document CC/2004/33 of 18.6.2004.

> " (25) … [R]ights granted by a Member State in whatever form, including by means of concession contracts, to a limited number of undertakings on the basis of objective, proportional and non-discriminatory criteria offering any interested party fulfilling them the possibility of enjoying such rights could not be considered to be exclusive or special rights."

Following this case law of the ECJ, according to the new definition of exclusive or special rights in the Utilities Directive, it is not just the existence of such rights that is relevant for determining whether they are within the scope of the Directive but also how the rights were granted. The Commission clarifies this by saying that;

> "if the entity has obtained rights – even exclusive rights – to carry on one of the activities referred to in the Directive on the basis of "objective, proportional and non-discriminatory criteria", such rights do not constitute exclusive or special rights within the meaning of the new Utilities Directive.[156]"

Hence, it is apparent that rights granted via public procurement or tender procedures in the utilities sector do not constitute special or exclusive rights. This is consistent with the approach to Art 106 the European Courts have uniformly found the nature of the grant to be relevant in deciding whether or not the rights fall within Art106. It has made clear that for special or exclusive rights to exist, the number of entities being accorded the right must be limited, and that the grant is not simply open to all qualified applicants. For example, in *Banchero*[157], Italian tobacco distribution laws did not entail special or exclusive rights as, although they governed access to the market, all undertakings were treated the same.

Similarly, "special rights" are given by the State to a limited number of undertakings chosen in a *subjective and discretionary manner*. For example, in GEMA[158], collecting society participation was required by law. Consequently, there could therefore be no grant of special or exclusive rights since there was no limit to the number of rights societies which could exist. On a similar thread, IP rights does not entail a grant of exclusive rights for the purpose of Art 106(1) because they involve laws which lay down criteria which any undertaking is free to satisfy: there is no question of a closed class[159].

4.9 Conclusions

This Chapter was set out to: (i) clarify the difference between licensing and exclusive agreements (ii) examine scope of exclusive rights and establish whether such rights could be granted to more than one third party re-user and (iii) examine the nature of exclusive rights, in particular whether they include grants via tender procedures.

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[156] Commission of the European Communities, *Explanatory Note on the Utilities Directive Definition of Exclusive or Special Rights*.

[157] Case C-387/93 Banchero [1995] ECR I-4663.

[158] *GEMA* OJ [1971] L 134/15, [1971] CMLR D35.

[159] As explained in Whish, R., *Competition Law*, (Oxford, OUP, 2008), p. 223.

Difference between licensing and exclusive agreements

Under the PSI Directive PSBs are allowed to allow re-use under licence conditions, basically giving authorisation to exploit the PSI (in a certain way, under certain restrictions). Exclusive arrangements will often carry similar provisions and will therefore be a very specific type of licence agreement. It can be said therefore that there is a continuum between the provisions on licensing and exclusivity, whereby it is possible that an overlap arises: a licensing condition may be so restrictive that it is in effect a de facto exclusive arrangement.

The essential difference between the two is that the exclusive arrangement (irrespective of the number of exclusive right holders), by its very nature, will explicitly limit the capacity of the PSB to enter into other re-use contracts. Hence, if a licensing condition is only open to a very closed class of re-users, it should be treated as an exclusive agreement and must be terminated as such.

Scope of exclusive rights

The preparatory works of the PSI Directive explicitly refer to Art 106 TFEU. However, there is one pivotal difference: while Art 11 only refers to ”exclusive rights”, Art 106 mentions both special and exclusive rights. The established case law on Art 106 has determined that ”exclusive” rights refer to a monopoly granted to one single entity, while special rights cover the alternative situation where rights are granted to two or more (but always a limited number) of entities. In spite of the temptation to accordingly interpret the term ”exclusive right” in Art 11 of the Directive (thus limiting the scope to the situation where there is one exclusive right holder), the repercussions would be contrary to the aims of the Directive.

It is clear that if a narrow interpretation is adopted, situations can get through the net cast by the PSI Directive even though they do restrict competition.

The crucial point is that within the context of Art 106 (as well as the Telecommunications and Transparency Directives), the difference between the terms ”special” and ”exclusive” is immaterial, since the provisions cover both eventualities. This is not the case in the PSI Directive. Because there is no ”fall back” onto the category of ”special rights”, the consequence of adopting a narrow definition in line with these approaches is that arrangements involving more than one user would not be caught by Article 11.

On top of that, Art 11(1) lays down the objectives and aim of the prohibition of exclusive arrangements. This makes clear that anything restricting the openness of the market should not be permitted. Whether the arrangement includes one or five re-users is irrelevant.

The most likely conclusion which can be drawn from this is that ”exclusive” in the PSI Directive should be interpreted teleologically, rather than *per analogiam* to include any measures restricting competition.

Exclusive rights granted via tender procedures

Given the aim of Art 11 and the wording of the Commission supporting statement, it can be concluded that, most likely, only grants of exclusive rights for re-use were intended to be caught by Art 11. Nonetheless, the reference to tenders and that, according to Art 3. of the Public Procurement Directive a contracting authority may grant special or exclusive rights to carry out a public service activity, do support a interpretation that also Art 11 should encompass special rights.

5 Final Observations

Although going beyond the questions posed in the SCA's assignment, we consider it appropriate to provide six final observations linking into the issues concerned at a more practical level.

(i) Incorporating the PSI Directive into member states legal systems, let alone applying the PSI Directive, is not an easy task. The transcending nature of the subject matter, pulling together various areas of law, which are traditionally separated and thereby creating uncertainty causes problems.

(ii) The objective of the Swedish legislator when implementing the PSI Directive was to create a narrow exemption for when the PSI Act should not become applicable. Interpreting "business activity" under the PSI Act in a narrow fashion, so not to include any public tasks, would enable to the PSI Act to become a useful tool when the Swedish government is bringing forward the value inherent in PSI to the open market.

(iii) The term "exclusive rights" most likely has an extensive meaning, in the sense that it covers in essence any arrangement that limits the PSB to enter into other contracts allowing for re-use of its PSI. There is no obstacle in interpreting the term "exclusive rights" under the PSI Act to encompass the same numbers of receivers as the term would encompass under the PSI Directive.

(iv) In any case, it would most likely be beneficial to the proper functioning of the PSI Directive if the relevant authorities would provide further guidance as to the meaning of the terms concerned and, in the case of the "business activities", thereby relate to the intentions of the European legislator.

(v) Of course, a Swedish court (or even the SCA) may also come into a position to provide such guidance through a concrete decision submitted to it by parties, however, this may depend on the willingness of PSBs and/or re-users to actually take such case to court.

(vi) Where it is not unlikely that the European Commission will conclude, in the framework of the 2012 PSI Directive review, that it would like to amend the Directive, the Swedish delegation involved in future negotiations hereon, may want to bring up the issues (and possibly others) for clarification in this process.

Annex 1: Analysis of the ”public task” in other Member States

This Annex provides complete detail of the scope of the PSI Directive as implemented in Finland, France, the Netherlands and the UK. These four countries have adopted the same approach as the Directive, referring to the ”public task.” Given that Art 1(2)(a) of the PSI Directive allows MS room for manoeuvre when implementing the Directive (they are to define the ”public task” themselves), it is notable that most have refrained from explicitly doing so, which itself has been the cause of numerous (internal) problems.

1. The ”public task in the Finnish Openness Act

According to a memorandum by the Finnish ministry of finance, the Finnish legislation fulfils the requirements of the directive well or even more widely than that required by the directive and as a result the existing legislation covers the obligations set forth in the directive. Hence, according to the Finnish legislator, the Finnish legislation[160] provides a wider/better opportunity to utilize the authorities knowledge- and information materials than what the directive requires.

The access to PSI is thus in Finland regulated by Act on the Openness of Government Activities (621/1999, hereinafter Openness Act). In Finland some authority registers are public (e.g. the trade register, the company register etc.) from which any individual has the right to obtain a statement or a copy.

The Finnish legislator defines a public task as a task which is imposed on a specific institution or unit. Responsibility for a public task does not automatically validate the use of public powers (Fi *julkinen valta*, Swe *Offentlig Makt*). A public task is a statutory task through the decision of the President, Prime Minister’s Office or Ministry that is given to a specific entity, organization or a natural person. The decision through which a public task is transferred to a given entity can be in the form of a power of attorney, agreement, approval, concession or a corresponding decision from which it is clear that the task has been transferred to a given entity. E.g. the general obligations for post offices are statutory while the basic services offered by the post offices are defined by the ministry of transport and communication. According to Finnish legal literature a statutory task does not automatically mean that this should be regarded as a public task[161]. Statutory obligations (tax liability, obligation to attend school and vehicle testing) could be named as an example of these. According to Mäenpää (2001) a task is seen as public if the nature of it is public and/or the task has been established as one that is being taken care of by the public sector. Characteristic public task are e.g. tasks that concern the use and care of fishing waters that belong to a given fishing territory.

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[160] Through the Act on the Openness of Government Activities (621/1999).

[161] Mäenpää, Olli (1991), Julkisen hallinnon muutosvaiheista Suomessa.

2. The ”public task” in the French Law of 1978

France was one of the first counties to introduce public information access laws[162], and with the advent of the PSI Directive it chose to implement the Directive into its already existing legal framework for document accessibility. It was one of only four countries to implement the Directive by the 1 July 2005 deadline and it did so by adopting texts similar to the Directive to modify the law of 17 July 1978[163]. The aims of these new texts ring true to the Directive, with their goals being predominantly focused on economic development and ensuring the availability of public sector information.

Importantly, with the transposition of the PSI Directive came the first acknowledgment in France that commercial re-use of documents was a justified economic objective[164]. Prior to this, commercial use of PSI was not permitted. It is also notable that the French law is broader than the PSI Directive to the extent that it includes by default cultural data within its scope; it is possible for such data to be excluded from the law only by creating licences. If no licence is granted then the cultural data is subject to the provisions of the law[165].

Chapter I of the French law now regulates the freedom of access to administrative documents, while Chapter II deals with the re-use of public sector information. Art 1 of this law addresses which documents fall subject to it. It lays down that ”administrative documents” within the scope of the law are documents produced or received within the scope of the public task of the State, territorialities, other public bodies or private bodies charged with a public task[166]. Art 1 also lists certain documents which will fall within the definition of ”administrative documents[167]”.

Contained within Chapter II, Art 10 sets down the key provisions relating to the re-use of documents. It provides the following:

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[162] Law on access to administrative documents: Loi no.78-753 du jillet 1978 de la liberte aux documents administrate.

[163] Ordnance June 6th 2005 and decree December 30th 2005. See PSI Re-use in France: Overview and Recent Developments, Ruth Martinez.

[164] http://www.gouvernement.fr/la-charte-de-reutilisation “La réutilisation des informations publiques est un droit offert à toute personne morale ou physique en vue d”une activité commerciale ou non.”

[165] In contrast to the PSI Directive Art 1(2)(f) which explicitly excludes cultural data from its scope.

[166] “Sont considérés comme documents administratifs, au sens des chapitres Ier, III et IV du présent titre, quels que soient leur date, leur lieu de conservation, leur forme et leur support, les documents produits ou reçus, dans le cadre de leur mission de service public, par l”Etat, les collectivités territoriales ainsi que par les autres personnes de droit public ou les personnes de droit privé chargées d”une telle mission. “

[167] “Constituent de tels documents notamment les dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles, correspondances, avis, prévisions et décisions.”

> "Information contained in documents produced or received by bodies as mentioned in Art 1… can be used by any person for purposes other than those within the public task for which the documents were produced or received.[168]"

It is notable that Art 1 of the French law has enlarged the PSI Directive by including documents held by private entities assigned to carry out a public task within its scope. Additionally, Art 1 can perhaps also be distinguished from Art 1(2)(a) of the Directive in the sense that it is a positive provision, setting out what comes within the scope of the law, rather than saying what is outside its scope. However, despite this difference, the effect is ultimately the same since the application of the law, as with the Directive, ultimately rests on the definition of the "public task." This should not therefore be considered as significant.

Concerning "re-use", Art 10 of the French law parallels Art 2(4) of the PSI Directive; both refer to the initial public task ("mission de service publique") as being key to determining whether the situation is one of "re-use".

Unfortunately, as with the PSI Directive, the French law does not further define what is meant by the term "public task". Information with regards to the scope of this task, and consequently the outer limits of application of the French law can however be gathered from other sources.

In France most PSBs can only intervene and provide information services in cases of market failure[169]. PSBs who disseminate information as part of their public task are distinguished from all other PSBs. If the provision of information is part of its public task, the PSBs able to provide such services alongside the private sector. Otherwise, it is strongly felt in France that the public sector should not intervene unless there is a failure in the market and the services would not be provided otherwise.

Although the term "service public" is used in various French legal texts[170], there is no unified definition of the term in legislation nor in jurisprudence. According to Eurosig[171], the term "mission de service public," used in the French law of 1978, does not relate to the material aspects of the public task, but rather to the purpose or aim of this task. As was found at European level, it notes that the criteria for defining this task are likely to vary depending on the economy, customs and institutions at any given time or place.

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[168] "Les informations figurant dans des documents produits ou reçus par les administrations mentionnées à l"article 1er, quel que soit le support, peuvent être utilisées par toute personne qui le souhaite à d"autres fins que celles de la mission de service public pour les besoins de laquelle les documents ont été produits ou reçus."

[169] See http://admi.net/jo/PRMG9400081C.html Circulaire du 14 février 1994. relative à la diffusion des données publiques, as discussed in Janssen, p. 328.

[170] Including two appearances in the Constitution; paragraph 9 of the Preamble and Art 11.

[171] Eurosig.eu website for resources on public services in Europe (Site resources sur les services publics en Europe), definition of "mission de service public" at http://www.eurosig.eu/article52.html?id_mot=2.

Public task activities can occur in order to meet social needs (at either local or national level), to promote an equal and effective use of resources, to provide services in the common interest which a competitive market would not provide or to bring social cohesion (for example through network services such as the post)[172]. It should however be noted that the term "mission de service public" covers diverse activities, such as the continuity of services, equal treatment of users etc.

It is the responsibility of the public authority to define its "mission de service public" with reference to the needs which it is responding to, the rights of those using the service and so forth. In other words, the "*mission de service public*" should set out in which cases intervention by the PSB is necessary and when a public task needs to be fulfilled. Eurosig notes that in each sector the "*mission de service public*" should be clearly defined and reassessed regularly by the PSB, taking account of changing circumstances and, especially relevant for the information sector, technologies. According to the French Conseil d"Etat[173], it is important that activities are not deemed public tasks unless they are indispensable to the realisation and development of social interdependence[174] and cannot be otherwise carried out on the market.

3. The Public Task in the Dutch Wob[175]

The need for transparency and openness in administrative actions has been recognized in the Netherlands since 1978, when the original Government Information (Public Access) Act (Wob) entered into force. The Dutch government has taken an active stance and has sought to increase the availability of PSI by encouraging the use of new technologies and the internet[176].

The PSI Directive was implemented into Dutch law by amending the Wob. Articles 1(2)(a), 2(4) and 10(2) of the PSI Directive are transposed via Arts 1h and 11a(2)

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[172] Le service public. Rapport officiel, Mission présidée par Renaud Denoix de Saint Marc, La Documentation Française, 1995, 1996, as referenced at the above.

[173] Conseil d"Etat, Rapport public 1994, La Documentation Française, 1995, pp. 126-127

[174] See http://www.eurosig.eu/article43.html, referring to the work Léon Duguit. The notion of "*missions de service public*" has been approached in French case law. Traditionally, In the context of public works (travaux publics), traditionally it was the case that such works could only be considered public where they concerned construction works, carried out in the aim of the general interest and on behalf or a public body (CE, 1921, Commune de Monségur, http://www.legavox.fr/blog/francois-fournier-murphy/privileges-administration-lors-realisation-travaux-5411.htm. However, in 1955 the *Effimieff* judgment (C, 28.03.1955, arrêt Effimieff) held that construction works undertaken with the aim of fulfilling a public task can also be carried out by a public body on behalf on account of a private person. Such actions can now be considered as being within the public task of a PSB. Further, in 2006, the French Conseil Constitutionnel held that the obligations of the "mission de service public" of *Gaz de France*, which were defined by law at national level, should also be imposed on other competing entities active in a public service sector in the area natural gas.

[175] Wijziging van de Wet openbaarheid van bestuur en enige andere wetten in verband met de implementatie van richtlijn nr. 2003/98/EG van het Europees Parlement en de Raad van de Europese Unie van 17 november 2003 inzake het hergebruik van overheidsinformatie (Wet implementatie richtlijn inzake hergebruik van overheidsinformatie) (Amendment of the Government Information Act and other acts implementing the Directive 2003/98/EC), of 22/12/2005, Staatsblad (Bulletin des Lois et des Décrets royaux) n° 25 of 19/01/2006, p. 00001-00004

[176] See the political guideline "Towards optimum availability of public sector information" Parliamentary Papers II, 1999-2000, 26 387, No 7.

Wob, which contain no additional national measures[177]. The Dutch government therefore decided to use the minimum level of harmonisation suggested by the Directive and does not push this policy and further.

The Wob also contains the rules for access to information; information that can be made public is set out in Arts 10 and 11 of the Act. The procedure for re-use has been contained within the Wob to "dovetail" the already existing access regime; by doing this, the Dutch government avoided applying two separate procedures for processing requests, making the regime simpler for both PSBs and users. Re-use is laid down as being *"the use of information which is public pursuant to this or another Act and which is incorporated in documents held by a governmental body, for purposes other than the initial purpose within the public task for which the information was produced[178]."* It is clear that re-use can also be of information which is made public by an Act other than the Wob, and unless information is "public", then it will not be open for re-use. In the Netherlands, information is public unless specifically precluded by law[179]. In this sense, there is a more solid standard for defining what is re-usable than in the Directive.

One difference between the PSI Directive and the Wob is that Art 1h does not contain a reference to the "commercial or non-commercial" nature of re-use[180]. This is because it was not considered necessary to explicit include this in Dutch law. However, given that the implementation is intended to have the same scope as the PSI Directive it goes without saying that both types of re-use are envisaged. Also, in line with the PSI Directive, re-use covers further use by a PSB outside the public task. Such situations are covered by the non-discrimination provisions to avoid cross-subsidies.

A specific exemption is provided in Art 1e which corresponds to Art 2(4) of the PSI Directive: Exchanges of information between PSBs within their public tasks are not to be considered as a situation of "re-use". However, again to avoid cross-subsidies, re-use does include further use within the organisation itself for activities outside the scope of its public tasks. The Explanatory Memorandum to the Wob cites the same "typical" example stated in recital 9 of the Directive (information produced on a commercial basis by a governmental body and in competition with others in the market). Further, the Explanatory Memorandum clarifies that a PSB is not required to produce documents with a sole view to re-use (i.e. unless it is already producing them as part of its public task)[181]. However, as soon as a PSB uses the

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[177] Amendment of the Government Information (Public Access) Act and other Acts in connection with the implementation of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (Act implementing Directive on re-use of public sector information), Explanatory Memorandum, Lower House, session 2004-2005, 30 188, No 3, at sections 1 and 4.

[178] Explanatory Memorandum, Idem, section 4(a).

[179] Explanatory Memorandum, Idem

[180] Explanatory Memorandum, Idem, page 12.

[181] Explanatory Memorandum, Idem, Art11eWob.

information it holds commercially, this is made ”public” and can afterwards be re-used by third parties[182].

Art 11f of the Wob contains a non-discrimination clause on the basis of Art 10 of the PSI Directive. The principle of equal treatment is also contained in Art 1 of the Dutch Constitution. The Explanatory Memorandum however points out that it only covers comparable categories of re-use. This does not prevent the exchange of information between PSB being free of charge for the exercise of public tasks, whilst other parties are charged for the re-use of the same documents[183].

4. The ”Public Task” in the UK PSI Regulations

The Re-Use of Public Sector Information Regulations 2005(the Regulations) were introduced by the UK government specifically to implement the PSI Directive, and cover Scotland, England, Wales and Northern Ireland. The UK was one of only eight Member States to have implemented the Directive by the deadline for transposition on the 1 July 2005. The effects of the Directive and subsequent Regulations in the UK have been strengthened by the role of OPSI and APPSI[184], whose roles have improved awareness and encouraged a number of PSI holders to make more information publicly available.

For the most part, the Regulations have taken a ”copy and paste” approach to the Directive, although some slight changes of wording appear in order to align the Regulations with existing UK definitions and legislative language[185]. For the most part, the Regulations follow the PSI Directive, although one notable difference can be seen with regards to the term ”public sector bodies”. While the Directive sets out a general definition of such bodies in Art 2(1), and of ”bodies governed by public law” in Art 2(2), the UK Regulation instead makes finite list of specific bodies which are to be considered ”public sector bodies” for the purposes of the Regulation[186].

The PSI Regulations, like the PSI Directive, distinguish between activities which are part of the public task and those which are not. The scope of the Regulations is therefore the same, in that only information produced as part of the public task is subject to the Regulations. The regulations, as with the Directive, mean that where public sector organizations are actually re-using information they should be subject to the same conditions as other private sector re-user.

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[182] Explanatory Memorandum, Idem, Art1h Wob.

[183] Explanatory Memorandum, Idem, Art11f Wob.

[184] (APPSI is almost unique in Europe in being an independent body set up by government to advise Ministers and the UK Office of Public Sector Information (OPSI) on re-use of PSI (see Chapter 1). Its members are drawn from the public and private sectors and from information traders, information collectors, academics and others. They are appointed either as experts or as representatives of particular sectors.)

[185] Explanatory Memorandum s 4.1.

[186] regulation 3 (1). This lists, for example, the Minister of the Crown, the Houses of Commons and Lords, as well as the devolved Parliaments, local authorities and police authorities.

The Directives referral to the MS to define the public task is a cause for great uncertainty; due to the nature of certain public sector organizations in the UK, what is to be considered a public task and what is not can be subject to debate. Although steps to increase PSI re-use in the UK have generally been hailed as successful, there remain concerns about the interpretation of terms in the Directive and, consequently, in the Regulations.

Despite the above, interpretative aids issued by PSBs relating to the PSI Act, take on a consistent approach to the "public task." For example, according to the OPSI Guide to the PSI Regulations and Best Practice, documents may be outside the scope of the public task where their production is "*not directly related to its core responsibility, such as where they are optional commercial products competing in the open market*.[187]" Further guidance issued by the Dartford Borough Council, provides that documents it produces that "*are not directly related to [its] core responsibilities (i.e. statutory functions*)" are outside the public task[188]. This echoes the reading of Arts 1(2)(a) and 10(2) of the PSI Directive in conjunction with its recital 9. However, the CUPI report[189] also acknowledges inconsistency in terminology, noting that "*terms such as "statutory function", "core task" and "public task" are used in several guidance documents, apparently interchangeably, but it is unclear whether they refer to identical activities.*"

As to concrete definitions, CUPI observes that, in a survey it conducted of PSI holders, only two out of 18 have a clear, standard definition of their public task which is formulated in a single document. This emphasises that although many such PSBs have published their aims and objectives, it remains unclear which of these fall within their public task. Where such uncertainty exists, it is impossible to obtain a definition which is operative with regards to the PSI Regulations. It should further be noted that the statutory functions of an entity can be drawn very widely[190], which in turn provide very little by way of a useful definition.

The boundary of the public task is difficult to see clearly, even when this is set out in writing. Both APPSI and OPSI are quick to point out that boundaries between public task and activities which are outside of this task is difficult to discern. This is especially the case for the government trading funds, which are, within their public task, required to commercialise their services in order to offset core and central overheads. Commercial activities are therefore a notable and crucial part of their public task. However, even these trading funds are not always producing services or data within their public task. At a certain point their activities will cross the line

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[187] http://www.opsi.gov.uk/advice/psi-regulations/adviceand-guidance/guide-to-psi-regulations-and-best-practice.doc

[188] http://www.dartford.gov.uk/foi/documents/LSP-PolicyonReuseofPublicSectorInformationNovember2010.pdf.

[189] http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft861.pdf

[190] CUPI gives the example of the provisions of the Environment Act 1995, which provides that the Environment Agency "may do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions" (s37.(1)(a)).

from public tasks to acting on the market; it is at this rather difficult to pinpoint time that the Regulations will cease to apply.

In order to help determine what is public task and what is (most likely) not, OPSI lists the following characteristic features of public task activities:

- It is essential to the business of the public sector;
- It explains the policy of public sector bodies;
- It sets out how the law, in both UK and EU, must be complied with;
- The citizen will consider the information to be key to their relationship with the public sector;
- There may be a statutory requirement to produce or issue such information;
- It enjoys an authoritative status by virtue of its issue by the public sector[191].

HM Treasury's "*Charges for Information: When and How*[192]" also includes guidance on the definition of the public task[193]. In this document, it can be determined that where the activities most closely involve "raw data", they are most likely to be within the scope of the public task. The further they veer towards "value-added information", the closer they will be to market activities. Nevertheless, it still remains that value-added activities are not necessarily outside the public task; instead it this is taken to be a "reasonable working assumption," where the presence of other factors may contribute towards rebutting this[194]. The fact remains that there are significant "grey areas" where the distinction is unclear, especially in situations where public bodies do not have a clearly defined statement of their purpose or obligations. In such cases, clarification of their *raison d'etre* is not only important with respect to the application of the PSI Regulations, but is also essential for providing the PSBs with peace of mind; without a clear definition, any decision with regards to an activity which may or may not is open to challenge[195].

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[191] See http://www.mod.uk/DefenceInternet/Copyright/CopyrightLicensingInformation.htm and OPSI, *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice*, June 2005.

[192] HM Treasury, *Charges for Information: When and How*, Guidance for Government Departments and Other Crown Bodies, July 2001, available online at: http://www.hm - treasury.gov.uk/about/open_government/opengov_charging.cfm.

[193] Raw data was defined in the HM Treasury, *Charges for Information: When and How* Guidance as *" information collected, created, or commissioned within Government which is central to Government's core responsibilities. The supply of selected components of a raw data package, exactly as in the package is raw data supply, but the supply with further analysis, summarisation etc, or of data at a different level of aggregation to that used by Government, is not raw data for the purposes of this report but is value-added information."* Value-added information was defined in the Review as *" information where value is added to raw data enhancing and facilitating its use and effectiveness for the user, for example through further manipulation, compilation and summarisation into a more convenient form for the end-user, editing and/or further analysis and interpretation, or commentary beyond that required for policy formulation by the relevant government department with policy responsibility. It also includes supplying retrieval software, or where work on material is included as part of the compilation of related data, and where there is not necessarily a statutory or operational requirement for Government to produce the material."*

[194] OPSI, The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice, June 2005.

[195] http://www.nationalarchives.gov.uk/documents/information-management/uk-implementation-first-years.pdf.

The review board of APPSI has already been involved in responding to significant questions with regards to the term "public task.[196]" Here, a complaint was made by Intelligent Addressing against Ordinance Survey directly relating to recital 9, which lays down that "*Activities falling outside the public task will typically include supply of documents that are provided or charged for exclusively on a commercial basis and in competition with others in the market*.". This example of what may constitute the "public task" appeared to be in conflict with public sector bodies like Ordinance Survey, whose core public task involves the commercialization of the information which it holds[197].

However, the exact scope of its public task is uncertain and has been subject to debate. In 2008, the Free Our Data Campaign's blog wondered: "*[W]here can the OS's public task be found? Not on the [Ordnance Survey] website, where you simply find "For the purposes of the PSI Regulations, Ordnance Survey's Public Task is defined as "embracing everything we do from time to time to fulfil our obligations under the Ordnance Survey Trading Fund Order 1999 (SI99/965) and the Ordnance Survey Framework[198]*"

The above was likened to simply saying "*whatever we do, it's a public task, because we do it[199]*" which laid down the circular nature of the "public task": an activity of a PSB is considered as part of the public task, so it is set down as such in law. These tasks recognised in the law are then considered public on the basis that the law says so.
The Review Board found that already existing definitions of what constitutes the public task were "*highly problematic and insufficiently precise[200]*." This tension appeared in parallel with other findings on the European side which adopted a similar tone. It did however, quite adamantly state that "*The Board certainly does not take the view that any supply of products by a public sector body on a commercial basis must necessarily fall outside that body's public task, but the boundary between what is within the public task and what lies outside it is difficult to discern, especially in the case of trading funds*."[201]

In attempting to discern this dichotomy, the Board considered whether the "public task" should be defined according to the *public need* for the information held by the

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[196] Review Board of APPSI Report in relation to requests by Intelligent Addressing Limited and Ordnance Survey to review certain recommendations made in the Report of the Office of Public Sector Information of 13 July 2006 relating to a complaint by Intelligent Addressing Limited (SO 42/8/4) Final text approved for publication 30 April 2007 available at http://www.appsi.gov.uk/review-board/review-SO-42-8-4.pdf.

[197] Part of the public task of UK trading funds is cost recoupment through participation in commercial activities. For a full explanation of UK trading funds see HM Treasury, Guide to the Establishment and Operation of Trading Funds.

[198] Arthur, C., "Where is Ordnance Survey's public task set out, exactly? And why is it paying an external PR company?", *Free Our Data: the Blog*, 12 May 2008, http://www.freeourdata.org.uk/ blog/?p=195. See also Ordnance Survey, "Re-use of Public Sector Information", http://www.ordnancesurvey.co.uk/oswebsite/aboutus/yourinforights/ropsi.html on 21/05/09.

[199] Arthur, C., "Where is Ordnance Survey's public task set out, exactly? And why is it paying an external PR company?", *Free Our Data: the Blog*, 12 May 2008 , http://www.freeourdata.org.uk/ blog/?p=195.

[200] The impact and success of legislation on the re-use of public sector information (Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 and the UK Regulations).

[201] The views of the UK Advisory Panel on Public Sector Information 31 July 2008.

PSB, or instead with reference to the *duties of the* PSB as laid down in local law and practice. Although Art 1(2)(a) provides that the scope of the public task should be defined by "*law or other binding rules in the MS, or in the absence of such rules, as defined in like with common administrative practice*," the Board is swayed towards a definition based more on the public need, as to define each MS's concept of the "public task" separately would minimize the attempted harmonization of the Directive. The Board sees that an amendment to the Directive which aims to clarify the scope of the "public task" would support the intended harmonization process, although it does not foresee that full harmonization would be possible since there remain numerous differences between MS. Nevertheless, it should be borne in mind that even where definitions are clarified in law, the public task should remain a fluid concept in nature, capable of altering with time and political circumstance where necessary.[202]

[202] Ibid.

Annex 2: Analysis of the term ”exclusive rights” in other Member States

This Annex provides complete detail of the scope of the term "exclusive rights" in Denmark, Finland, France, the Netherlands and the UK, as touched upon in section 4.4. It sets out the main points of the information gathered in the context of this study, which mainly highlight the inconsistencies in language used (at times "exclusive" is referred to in the singular, others in the plural). As a consequence, the findings are inconclusive.

1. Denmark

In the Danish Act, the term exclusive right is introduced in paragraph 10, where it is stated that the grating of sole rights are generally forbidden, unless motivated by public interest.

The term used in the Danish Act is “eneret”, literally meaning sole right.

In the beginning of 2010, a Danish study was carried out in order to identify potential exclusive agreements between public data providers and data re-users in Denmark, according to the Danish Act[203]. A total of 23 public data providers and 23 data re-users participated in the study. The study did not identify any exclusive agreements as defined by the PSI-directive.

The conclusion of the report was that the challenge in Denmark regarding re-use of public information is not associated with the potential existence of exclusive agreements but rather with finding practical means to disseminate public data and funding the activity.

2. Finland

There is limited regulation regarding exclusive rights in Finnish legislation. According to the Openness Act no exclusive rights can apply for a document issued by an authority (information) that has become public. According to section 16 of the Administrative Procedure Act and section 17 of the Openness Act authorities are obliged to treat those that request information equally.

3. France

The French Act of 1978, as amended by, implements Art 11 PSI Directive via its Art 14 as follows:

> “The re-use of public information shall not be subject to an exclusive right granted to a third party, except if such right is necessary for the exercise of a public task. The validity of the reason

[203] PSI: Identification of Potential Exclusive Agreements in Denmark Summary Report Submitted to the European Commission, A9 Consulting, Denmark, 30 April 2010.

> for granting such an exclusive right shall be subject to regular review, and shall, in any event, be reviewed every three years[204]."

Unfortunately, this Article of the French law does not provide any clues as to the scope or nature of the exclusive rights it intends to cover, with the exception of the use of the singular "un" to refer to "an" exclusive right granted to "a" third party.

Within the framework of the EA study in France[205], over 1500 French PSBs and over 635 Re-users were contacted at national, regional and local levels. However, only 5 potential leads were found relating to the potential existence of EAs in France. Of these, none involved grants of rights to more than one re-user.

Despite the supporting statement of the Commission indicating that grants of exclusive rights could be to more than one re-user, the wording of the questionnaires used in the French report is in the singular. For example, Question 7 asks: "*What is the name of the organisation or business with which you have have concluded this exclusive agreement[206]?*"

This presumption that one entity only can be granted an exclusive agreement is also present in the EA study, which paraphrases Art 14 of the French 1978 Act as including "any EAs … concluded between two "*authorities listed in Article 1*" of the [1978 law]." However, it is worth restating that apart from the usage of the singular ("an" exclusive agreement), this reference to two entities is not present in the 1978 law itself.

In Guidance issued by the French Agency for Immaterial Property of the State[207], the indication is also given that only grants to one entity can be deemed "exclusive". This Guidance says that where granting an exclusive right would permit the PSB to carry out its mission in the public task more easily, it may confer the exclusive exploitation of information on a "single beneficiary[208]."

4. The Netherlands

The PSI Directive is implemented in the Netherlands by the Government Information (Public Access) Act (Wob). Exclusive rights are dealt with in the Wob

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[204] This is the English translation of Art 14 as it appears in the French EA study. The Original French reads: "*La réutilisation d"informations publiques ne peut faire l"objet d"un droit d"exclusivité accordé à un tiers, sauf si un tel droit est nécessaire à l"exercice d"une mission de service public.Le bien-fondé de l"octroi d"un droit d"exclusivité fait l"objet d"un réexamen périodique au moins tous les trois ans.*"

[205] Awarded in response to a call for tender under the name "*PSI : Identification of potential Exclusive Agreements – France*" published in 21 September 2009.

[206] See *Etude d"identification des accords signés dans le cadre de la réutilisation des données publiques*, available at http://193.251.13.192/etude_CE_prada/form_etude_CE_prada_v2.htm "7. Quel est le nom de l"organisme/entreprise avec qui vous avez conclu cet accord d"exclusivité?

[207] Agence du patrimoine immatériel de l"Etat, *Cahier pratique "Le droit à la réutilisation des informations publiques Foire aux questions*", April 2010.

[208] At Point 3.3 : " l"administration pourra considérer que, compte tenu des impératifs de sa mission de service public, elle peut confier l"exploitation exclusive de cette information à un seul bénéficiaire."

in Arts 11g and 16[209]. According to Art 11g, exclusive rights of re-use are granted only if they are necessary for the provision of a service in the public interest[210]. Art 16 of the Wob provides for the transitional regime for exclusive rights which are in existence at the time the Act enters into force. Those agreements that do not qualify for an exception under Art 11e(2) must, in accordance with the PSI Directive, be terminated no later than 31st December 2008.

However, neither the Wob itself nor its explanatory memorandum contain any references to the number of re-users which may be granted an exclusive right.

The Netherlands was one of only two countries[211] to take steps to review and terminate EAs before the 31st December 2008 deadline set by Art 11(3) of the PSI Directive[212]. As early as 2006, the Dutch government commissioned a report into the possible financial consequences of terminating exclusive agreements between the government and third parties. Although the scope of this report was limited to central government only, it turned up very few potential EAs; only 4 were identified out of the 48 government bodies contacted. Despite the scope of this report being narrower than other country reports which were undertaken at the initiative of the European Commission[213], the relatively low number of EAs is consistent with the findings of these later reports and the clear message from the report was that there is no need for the government to panic.

Of the 4 exclusive agreements identified, none concerned agreements between a government body and more than one re-user. However, the questionnaire sent out to government bodies specifically asks:

> "When selling the information, and particularly the (electronic files), did your organisation grant exclusive rights to one or more of your customers?"

From this wording, it appears that the scope of the study did explicitly intend to catch situations where a PSB have granted such non-monopoly rights. This is consistent with rest of the report, which treats the term exclusive rights in a broad sense[214]. This wide meaning is also adopted in the later Belgian EA report, which

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[209] Amendment of the Government Information (Public Access) Act and other Acts in connection with the implementation of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (Act implementing Directive on re-use of public sector information), Explanatory Memorandum, Lower House, session 2004-2005, 30 188, No 3. http://www.ec.europa.eu/information_society/policy/psi/docs/.../netherlands/en_tra.doc.

[210] Art 11(e)(2).

[211] Along with the UK, see http://ec.europa.eu/information_society/policy/psi/facilitating_reuse/exlusive_agreements/index_en.htm

[212] *Time to pay the bill! A study of the possible financial consequences of legally terminating exclusive Government agreements on facilitating the re-use of public sector information*, ZENC BV Lisette Heijma, Salima Mahyou and Marc de Vries, The Hague, 29 January 2006.

[213] Ex the French EA study covered national, regional and local agreements.

[214] This can be read from the wording of the report, for example on p. 15 concerning the Framework agreement for Official Publications : "*Although these designation regulations do not represent an "agreement or other agreement" from a strict civil law or grammatical point of view – we are dealing with a public law entity- it appears difficult to maintain that his*

describes "*agreements granting exclusive rights*" as "*all agreements (written or oral) by which a PSB limits the possibility for re-use to a limited number of parties.*[215]"

5. The UK

Regulation 14 of UK Re-use of Public Sector Information Regulations 2005 prohibits exclusive agreements. It provides:

> (1) Subject to paragraph (2), a public sector body shall not enter into an exclusive arrangement with any person including an applicant.
>
> (2) A public sector body may, where necessary for the provision of a service in the public interest, enter into an exclusive arrangement."

Unlike the PSI Directive, the Regulations also provide a (limited) definition of what is meant by an "exclusive arrangement". It should be taken to mean "*a contract or other arrangement granting an exclusive right to re-use a document.*[216]" Unfortunately for defining the scope of potential EAs, little can be drawn from this explanation, since the singular "an" in this case refers to the right and not to the number of re-users who can be subject to this arrangement.

Since 2008, the UK has been regularly reviewing the exclusive agreements which are in place. Currently, five exclusive agreements are reported in the UK, although none of these involve more than one re-user[217].

The wording of the OPSI Guide to the PSI Regulations for Central Government[218], issued in 2005, describes the situation of exclusive arrangements within the Regulations. It has the following content:

> "The Regulations set out the principle that exclusive arrangements should not be entered into because it prevents others from re-using the document and inhibits competition. This covers appointing publishers to publish versions of documents endorsed by departments as well as licences covering the re-use of the document.[219]"

This statement, as well as the statements surrounding it[220], do not limit themselves in wording to grants of exclusive rights to one re-user.

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arrangement does not contravene the ban on exclusiveness arrangements. In other words, these arrangements will have to be terminated in time."

[215] *Belgian EA Report*, Annexe 2 Questionnaire sent to PSBs.

[216] Regulation 14(6).

[217] http://www.nationalarchives.gov.uk/information-management/policies/exclusive-agreements.htm

[218] Office of Public Sector Information (OPSI), *The Re-use of Public Sector Information: A Guide to the Regulations for Central Government Practical Guidance on applying the Re-use of Public Sector Information Regulations (SI2005/1515) which implement European Directive 2003/98/EC on the re-use of public sector information*, June 2005.

[219] Idem, point 9.1.

[220] Specifically points 9.2- 9.4 on exclusive arrangements.

In 2008 OPSI undertook its first review of exclusive arrangements. The accompanying letter by way of explanation of these studies[221], which was later conveyed to the European Commission and recommended for use by other MS as a template of a standard letter[222], lays down examples of agreements what would considered "exclusive".

This list includes situations where a government department has:

"*1. appointed a publisher to publish material exclusively on its behalf;*

2. licensed one person or organisation the exclusive right to re-use material;

3. digitized archived information to bring it online;

4. aggregated information from a range of other public sector bodies to create a national data set – for example planning applications, job vacancies;

5. outsourced the operation of information services.[223]"

Although the above list does include granting rights to one person or organisation, this list does not appear to be exhaustive. It is therefore inconclusive, since the intention of the UK to exclude grants to more than one third party cannot be determined on the basis of the non-comprehensive examples laid down in this list.

In contrast, the (undated) OPSI "*Public Sector Information Guidance Note 6: List of Exclusive Agreements*[224]" mentions specifically the grant of rights to *one* person or organisation. OPSI explains:

"*Action is required for the following reasons… because granting an exclusive right to one person or organisation in information prevents anybody else from re-using it. This obviously goes against one of the central aims of the PSI Regulations which is to encourage the re-use of public sector information by many potential re-users. Restricting dissemination of information to one organisation means that one organisation is given preferential treatment. It also means that others are prevented from using the information in their value added products and services.*"

The above explanation indicates that removing anti-competitive practices in the information market is at the forefront of their concerns. Given this aim of the action against exclusive agreements, situations where two third parties are granted an

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[221] OPSI Letter and Questionnaire, 13th August 2008, available to download at http://www.epsiplus.net/news/news/locating_exclusive_agreements.

[222] The United Kingdom *Report on the Re-use of Public Sector Information, Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty*, Cm 7672 2009, July 2009 at point 5.22.

[223] OPSI Letter and Questionnaire, 13th August 2008, available to download at http://www.epsiplus.net/news/news/locating_exclusive_agreements.

[224] http://www.nationalarchives.gov.uk/documents/information-management/list-of-exclusive-arrangements.pdf.

exclusive right for re-use of certain information should not be dismissed simply because they are not strictly ”monopoly” rights. Despite the use of the singular in referring to one organisation, it should have been conceivable that access to information would also be restricted where exclusive rights are granted to more than one person or organisation. Despite this inconsistency between the aim and practice, from the use of the singular, it appears that the UK (at least in this instance) read the term ”exclusive” in line with Art 106 terminology, excluding grants to two or more entities which may nonetheless limit the possibility for others to re-use it.

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