

POLICY RECOMMENDATION ON THE COMPETITION LAW ISSUES OF THE RE-USE OF PUBLIC SECTOR INFORMATION (PSI)

by

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Based on a description of the structure and competitive relationships that characterize PSI markets, and in the light of some case studies and legal decisions from several EU Member States, this document addresses what legal rules a new Directive, amending Directive 2003/98/CE on the re-use of Public Sector Information, could introduce in order to both discourage anticompetitive business practices and make them easier to be detected and proved.

KEYWORDS

PSI, Antitrust, Abuse of Dominance

1 PRELIMINARY REMARKS

Regulation and competition law are two of the main tools that public institutions may adopt in order to improve the functioning and development of markets. Regulation sometimes aims to change the competitive structure of specific sectors – identified as “strategic ones” – by setting the boundaries and rules of the competitive game. In contrast, competition law declares unlawful certain business practices – i.e. agreements and unilateral conduct by dominant firms – that occur under specific market conditions.

This document acknowledges that Directive 2003/98/CE (hereinafter, “the Directive”)¹ on the re-use of Public Sector Information (hereinafter, “PSI”) – as well as the most recent proposal for a new directive amending it (hereinafter, “the Proposal”)² – are regulatory tools whereby the EU legisla-

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¹ See OJ L 345, 31.12.2003, p. 90.

² See *Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/98/CE on re-use of public sector information*, Brussels, 5 March 2012, 2011/0430 (COD).

ture aims to design PSI markets. However, this document will not be discussing all the policy issues that arise in the context of this regulation, which are analyzed in other LAPSI's policy recommendations. Rather, it will be focusing solely on some matters concerning competition law. Based on a description of the structure and competitive relationships that characterize PSI markets,³ and in the light of some case studies and legal decisions from several EU Member States, this document shall address what legal rules the Proposal could introduce in order to both discourage anticompetitive business practices and make them easier to be detected and proved. The Directive, indeed, already encompasses many recitals and provisions that aim to ensure and protect competition, by addressing the relationship between public sector bodies, operating in the upstream market for the provision of PSI, and private companies, competing in the downstream market for the re-use of PSI.

2 PSI MARKETS AND PSI CASES

By and large, competition law analysis of business practices most frequently starts with the definition of the relevant markets that are affected by such practices and the understanding of the competitive dynamics that characterize those markets. As a result, these Policy Recommendations try to offer some guidance for such an analysis in cases relating to PSI.

As to the definition of the relevant markets,⁴ two product markets need to be distinguished regardless of whether public sector entities or private sector firms may be competing on them: the market for the provision of that information (the upstream market of PSI) and the market in which that information is delivered to customers in the form of value-added goods or services (the downstream market for value-added products).⁵

As to the competitive dynamics that may characterize these markets, granted that they differ considerably according to the kind of PSI exam-

³ As it is well known, competition law and competition law analysis are heavily fact-specific. See, in this regard, Forrester I., 2011, *A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"*, in Ehlermann C.D., Marquis M. (eds.), *European Competition Law Annual 2009: Evaluation of Evidence and Its Judicial Review in Competition Cases*, Hart Publishing, Oxford, p. 410 (stating in a very effective way, «just the facts ma'am: competition cases are all about facts»). Since the Directive provides for one-fits-all-rules – i.e. rules that must apply to many different kinds of PSI, such as meteorological, roadmap, marine, environment, financial, business, and property data – also these Recommendations refrain from taking account of the many peculiarities of the different markets where the mentioned species of PSI may be traded, so to offer a general analytical framework wherein more detailed considerations could then be placed.

⁴ As to the definition of what a relevant product market is, and as to the criteria to be applied see *Commission notice on the definition of the relevant market for the purposes of Community competition law*, OJ C 372, 9.12.1997, p. 5, available at <http://ec.europa.eu/competition/antitrust/>.

ined,⁶ it is worth noting that, on the one hand, public sector bodies do not only act in the upstream market, but operate in downstream market as well.⁷ Indeed, in the last few years they have been able to envisage the business opportunities arising from the re-use of PSI or, at least, to follow and imitate private companies in exploiting the business opportunities that the re-use of PSI entails. For instance, this is what is happening now in the Italian market for information goods resulting from cadastral data. On the other hand, nowadays private sector firms are not operating only in the downstream market. They are also starting to produce information that is equivalent, or even substitutable, to that held by public sector bodies.⁸ For instance, this is the case of Google and Facebook, that generate content, such as geographical and personal data, that in the past only public sector bodies were able to provide. Another example is traffic and topographic information, where technology has allowed private sector firms to produce information that may substitute information generated by public sector bodies in pursuance of their public task.⁹ It is hard to predict how these markets will evolve in the future: firstly, more and more public sector bod-

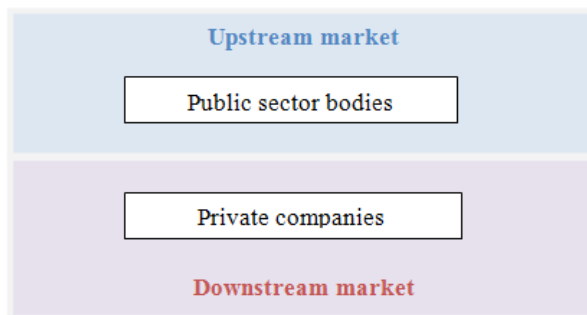
⁵ For the sake of simplicity, the scenario depicted here does not distinguish those intermediate stages, such as the one of collecting PSI and combining it with different tangible and intangible inputs, that in the real world may separate the initial phase of the mere production of PSI from the final phase of its delivery to customers. This simplification is not meant to conceal that, at such intermediate stages, value is effectively added to the original PSI and that, at each of these stages, private firms may find themselves competing against a vertically-integrated public sector body. The point in keeping the market analysis as simple as possible is that, given the whole chain of markets, the potentially anticompetitive character of the practices regarding the intermediate markets is not different from the character of most of the upstream and downstream markets.

⁶ See footnote 3 as to the need of keeping the here-developed discussion at a very general level.

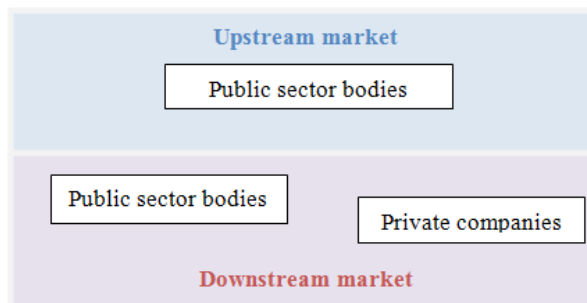
⁷ Although it can be maintained that the Directive and the Proposal want to encourage private sector firms to fully develop PSI re-use, it is worth noting that none of them prevents public sector bodies from acting in the downstream market as well, maybe in an indirect way, i.e. by delegating/assigning re-use activities to private companies that they control. Rather, they expressly envisage this case in Article 10(2) by observing that "if documents are re-used by a public sector body as input for its commercial activities which fall outside the scope of its public task ...". Indeed, if one of the policy assumptions underlying the Directive and the Proposal is that a growing re-use of PSI would lead to new information goods, new jobs and economic growth, it is therefore consequential to deem the private/public nature of re-users as not being relevant *per se*. After all, not only private sector companies have a clear interest in exploiting the new business opportunities coming from the re-use of PSI; but public sector bodies as well may benefit from the further and fresh sources of income coming from PSI re-use. From a competition law perspective, moreover, a market in which public sector bodies compete with private sector firms is totally acceptable, even when the former are vertically and collaterally integrated: competition law, indeed, is well-equipped to face potential anticompetitive conduct that public sector bodies might adopt to the detriment of not only their private competitors, but more importantly of the general interest in having efficient and innovative markets.

⁸ The Directive and the Proposal do not take into account the case of private companies trying to move into the upstream market. However, private sector firms might be interested in generating information that substitutes PSI at least when: (a) public sector bodies are not the sole entities, such as courts, that are authorized to generate a specific content, such as court decisions; and (b) the generation of that content is economically feasible. Now, it is precisely in this last regard that it can be argued that a "low price policy for PSI" could discourage the private sector firms to either remain or enter into the upstream market. In the former case, indeed, they would lose the money that they have already invested to produce PSI; in the latter case, they would not have any incentive to start producing raw data that can substitute PSI. For a further discussion of this last argument see LAPSI Guidelines and Position Paper on the PSI Charging Principles.

ies could become more active in downstream markets by offering value-added services regarding their own PSI; secondly, more and more private sector firms could enter the upstream market by generating information goods able to substitute PSI. From a theoretical and general standpoint, however, the description of the relevant product markets regarding PSI, as well as the preliminary assessment of the competitive dynamics that are currently taking place in these markets, suggest that four alternative market scenarios, with different competitive relationships, can be thought of:

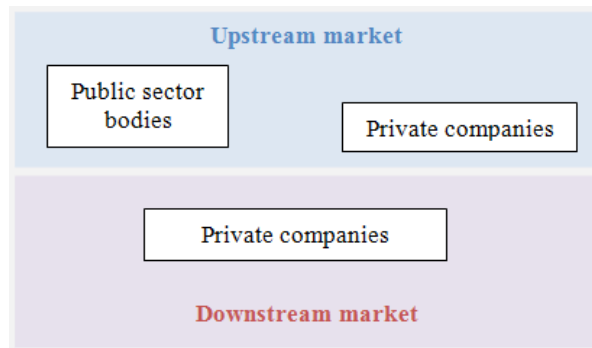
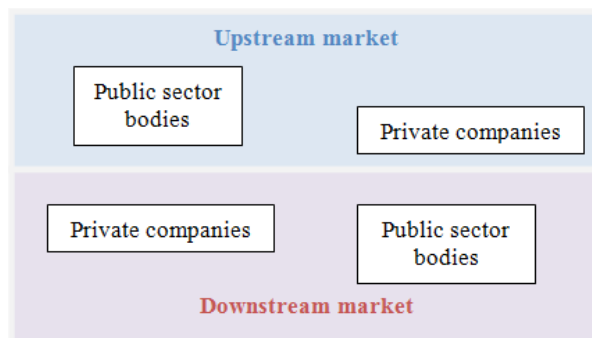


Scenario no. 1



Scenario no. 2

⁹ Cases like that mentioned in the text highlight the general interest in enabling private companies to move into the upstream market. In the long run, indeed, when private companies show that they are able to substitute public sector entities in generating PSI-like information, it might happen that there will no longer be any economic reasons to make some activities fall within the scope of public task and therefore to finance the fulfillment of that task by taxes. In such a future scenario, it would still be up to the State to decide whether there are still good political arguments for defining the public task as it used to be or whether public funds should be reallocated toward other or new public tasks. For the traditional economic idea that the generation of information is to be a task of the public sector, since information is a non-excludable and non-rival good (i.e. a public good in the economic sense) see Stiglitz J.E. (2000), *Economics of the Public Sector*, W W Norton & Co., New York.

*Scenario no. 3**Scenario no. 4*

In all these market scenarios, public sector bodies may engage in anticompetitive practices in the sense of competition law. However, it is not the purpose of this document to classify such unlawful practices. Moreover, any attempt to do so would have to be considered inappropriate given that modern competition policy advocates an effect-based approach,¹⁰ according to which any assessment of a practice has to embrace a complete analysis of the effects of that behaviour in the relevant market and, therefore, of the facts characterizing the specific case.¹¹

¹⁰ In other words, by and large, contemporary competition law links the illegal nature of the conduct under scrutiny not to the presence of certain formal elements (such as some peculiar contractual clauses) but to the economic effects that the practice is able to produce in the identified relevant market.

¹¹ Nevertheless, some examples of unlawful practices will be provided in the footnotes below, which have arisen in the course of the first years of the implementation of the Directive in the EU Member States.

Nevertheless it is worth considering that, in the course of the first years of the implementation of the Directive in the EU Member States, public sector bodies have been charged with and, sometimes, fined for having abused their dominant position¹² via: (i) unjustified refusal to license PSI¹³; (ii) excessive prices¹⁴; (iii) predatory prices financed via cross-subsidies¹⁵; and (iv) anticompetitive discriminating practices in the form of price squeezes.¹⁶

3 PROPOSED CHANGES

The Directive and the Proposal already encompass many recitals and provisions that, when implemented, can effectively and efficiently protect competition, by working in lieu of the more cumbersome competition law rules. For instance, the general obligation for public sector bodies to make PSI available to re-users as provided for by Article 3 works as what competition lawyers would have called a “compulsory license”. Likewise, the prohibition of unjustified refusals of PSI as set forth by Article 4 refers to the doctrine of objective justification as established for abuses of dominance.¹⁷ Finally, Articles 8, 10 and 11 of the Directive and the Proposal already establish many rules consistent with competition law principles dealing with vertical agreements and vertical abuses of dominance; namely that: (i) licensing conditions “shall not be used to restrict competition”; (ii) re-use has to be granted at “fair, proportionate and non-discriminatory conditions”; (iii) public sector bodies that have started re-using their own PSI have to grant

¹² For the notion of dominant position and for the criteria to be applied, see *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45, 24.02.2009, p. 7, paras 9-18.

¹³ See Agcm, A4 — Ancic/Cerved, provv. n. 452, 10 aprile 1992, in Boll. 7/1992.

¹⁴ See App. Torino, 11 febbraio 2010, PNP Italia s.r.l. c. Agenzia del Territorio.

¹⁵ See Cons. Conc. Avis no. 97 A-10, 25 Février 1997 relatif à une demande d'avis présentée par le Groupement des éditions de la presse nautique et portant sur des questions de concurrences soulevées par la politique éditoriale du service hydrographique de la marine, BOC-CRF 18 Novembre 1997, p. 759; and Teresi L. (2005), ‘Données publiques et concurrence’, *Concurrences*, Vol. 4, p. 147 and Bruguere J. (2002), *Les données publiques et le droit*, Editions Litec, Paris, pp. 140-145.

¹⁶ See Agcm, A129 — Denunce Infocamere-Cerved, provv. n. 5446, 6 novembre 1997, in Boll. 45/1997. Furthermore, see what was discussed in United Kingdom Marine Information Council Working Group On Data Access (2003), *Achieving optimal value from publicly funded marine information resources*, p. 8, available at <http://epsiplatform.eu/sites/default/files/ezpublish-media/UKMIC%20-%20achieving%20optimal%20value.pdf>; Y. Volman Y. (2004), *The re-use of public sector information in the EU. Increasing the scope for cross-border exploitation*, in Van Loenen B., Kok B.C. (eds.), *Spatial data infrastructure and policy development in Europe and the United States*, DUP Science, Delft, p. 62; and Weiss P.N. (2004), *Borders in Cyberspace: Conflicting Public Sector Information Policies and their Economic Impacts*, in Aichholzer G. & Burkert H. (eds.), *Public Sector Information in the Digital Age. Between Markets, Public Management and Citizens' Rights*, Edward Elgar Publishing Limited, Cheltenham, pp.145-149.

¹⁷ Typically, the protection of national security is included among the reasons that can justify the refusal to license PSI. Furthermore, the protection of competition could be listed among them, whenever the PSI in question consists of business data regarding prices and costs and the market where these data are going to be disseminated is oligopolistic. In such a scenario, indeed, the dissemination of that information could increase market transparency and, in that way, firms' ability to collude.

the same opportunity to private companies as well; and (iv) exclusive agreements must be forbidden, except those cases in which such agreements are a necessary condition for providing a service of general economic interest.¹⁸

From a competition law perspective it can be asserted that some of these provisions are too broad and, hence, an over-deterrence. In particular, competition lawyers would advise both the general obligation to license PSI (Article 3) and the principle of non-discrimination concerning the conditions of re-use (Article 10) only in cases where the public sector body in question were effectively the sole supplier of the needed piece of information (market scenarios 1 and 2, above). In contrast, where private undertakings effectively competed as suppliers of similar information (market scenarios 3 and 4, above), competition lawyers would exclude distortions of competition, resulting from unjustified refusals to license, and discriminatory conditions, because private sector firms acting in downstream markets would be able to receive information equivalent to PSI from private sector companies. However, since the case of a competitive upstream market for the supply of information goods equivalent to PSI is still quite theoretical, we *do not* recommend changing the texts of Articles 3 and 10, in order to make them more consistent with competition rules. Indeed, we hereby recognize that, if articles 3 and 10 were re-written in order to cope with the different market scenarios that might arise, it would be difficult and expensive to establish in which market scenario, firms are actually operating. Consequently, the advantages in terms of simplicity and time, that the current Articles 3 and 10 actually guarantee, would be nullified.

Differently, we hereby maintain that two other changes could be suggested.

First, since the enforcement of competition law can be cumbersome and expensive, and since it occurs *ex post*, often once the harm to competition has already occurred, or once the business opportunity springing from PSI has already vanished, structural modifications should be made to the current Directive in order to both reduce the incentives for public sector bodies to undertake anticompetitive practices, and make these practices easier to be detected and proved. For instance, given that public sector bodies might

¹⁸ A different issue could be discussing whether exclusive licenses would also be necessary in cases other than those where they serve as a means to provide a service of general economic interest. See, in this regard, LAPSI Guidelines on PSI Licensing Agreements. Furthermore, another issue might be that of understanding whether, in the cases where exclusive licenses are necessary, auction systems would be the proper tool to select the licensees; and this given the charging principles set forth by the old and the new Article 6 of the Directive and the Proposal (see LAPSI Guidelines and Position Paper on the PSI Charging Principles).

undertake anticompetitive pricing strategies, such as the one mentioned above, we hereby suggest adopting a provision providing for “vertical disintegration”. Namely, in order to prevent cross-subsidization and to enhance cost transparency, the new Directive should oblige public sector bodies that want to commercialize their own PSI in downstream markets to “vertically disintegrate” by establishing separate entities for providing value-added products and services.¹⁹ To be sure, the creation²⁰ of separate corporations whenever public sector bodies decide to re-use their PSI, first of all, could prove to be costly (i.e. expensive and complex) and, hence, reduce the incentives of public sector bodies to re-use PSI themselves; and, secondly, might prevent public sector bodies from using the income flowing from the re-use of PSI to produce better and more PSI. Therefore, a less intrusive provision – that is however able to reduce the incentives for anticompetitive pricing practices and guarantee cost transparency – could be that of obliging public sector bodies to keep “separate accounts” for the licensing of PSI, on the one hand, and the licensing of other information products and services, on the other hand.

Secondly, in order to make anticompetitive pricing strategies (such as the ones listed above) easier to be detected and proved, the new Directive should not condition the obligation to “indicate the calculation basis for the published charge” as already provided for by Article 7 to the “request” of re-users. Public sector bodies should generally be under an obligation to disclose all their costs.

¹⁹ In other words, the new Directive could reproduce a text similar to Article 8(2bis) of the Italian Competition Act, about Public undertakings and statutory monopolies, which states that public undertakings “shall operate through separate companies if they intend to trade on markets other than those on which they trade” because they are entrusted, by law, with the operation of services of general economic interest.

²⁰ To be sure, from a practical standpoint, this should not be deemed to be the same as those unbundling cases that occurred in the energy sectors. Indeed, but for those few actual cases where public sector bodies are already operating as PSI re-users in secondary markets via their same administrative structure, the recommendation for vertical non-integration requires the creation of brand new companies for brand new economic activities and not the splitting up of a company that has been operating as a single entity in many markets.