

Exclusive arrangements for the re-use of public sector information

The Directive 2003/98/EC on the re-use of public sector information provides that the re-use of information contained in publicly available 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 this information. The necessary corollary to such obligation of overall openness is the prohibition that public sector bodies grant exclusive rights in their contracts /arrangements with third parties (Article 10.1). Moreover, existing exclusive arrangements had to be terminated at the end of the contract or in any case not later than 31 December 2008.

Considering the reasons underlying the prohibition of exclusive agreements, namely that re-use of public sector information be open to all actors in the market, exclusive 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. 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.

This general prohibition admits only one exception, namely where the exclusive right is necessary for the provision of a service in the public interest, but in that case the exclusive arrangement has to be transparent and made public, and the reasons for granting the exclusive right have to be regularly reviewed, at least every 3 years (Art 10.2).

It goes without saying that it is up to the public sector body to demonstrate that the strict requirements of this special case are met, namely:

- (1) the provision of a service
- (2) in the public interest, and
- (3) the 'necessity' link with the exclusivity of the right granted (the service could not be provided without the exclusivity).

Moreover, the limitation only applies to the specific public sector information the re-use of which would not take place absent the exclusive right: this may be the case if no commercial publisher would publish the information without such an exclusive right (Recital 20).

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