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**European Commission  
Directorate-General for Information Society and Media  
Unit E-4 Digital Libraries and Public Sector Information  
Mr. Javier Hernandez-Ros**

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**also with Mail [info-psihelp@ec.europa.eu](mailto:info-psihelp@ec.europa.eu)**

**Dr. Öhlböck – PSI-Review**

Wien, 10. September 2008

Dear Mr. Hernandez-Ros,

I am pleased to accept the offer of the European Commission to contribute to the PSI Review.

I am a lawyer living in Vienna and have been dealing with the re-use of Public Sector Information for many years and have already written several publications in this respect. My current commentary<sup>1</sup> on the Austrian implementation of the PSI Directive was published recently ([www.lindeverlag.at/verlag/buecher/978-3-7073-1340-6](http://www.lindeverlag.at/verlag/buecher/978-3-7073-1340-6) - ISBN 978-3-7073-1340-6). In order to avoid repetition, I refer to specific passages therein. I am sorry that I did not follow the question structure that you have selected, but rather dealt with selective points on several separate problems.

## **1. Implementation in 10 laws**

Austria has implemented the PSI Directive in 10 laws (one federal law, nine state laws). Through this, the further development of the information market is significantly hindered. For example, a company that requires data from all nine Austrian federal

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<sup>1</sup> *Öhlböck*, Kommentar zum Informationsweiterverwendungsgesetz, 2008.

states for a new type of application needs to submit ten applications, pay fees according to ten different calculation models and, in the worst case, carry out ten procedures. This does not even take into account the data from municipalities.

Although alternative options were available for this form of national implementation, they were not selected<sup>2</sup>. This is not least due to the fact that individual state governors do not want to lose influence over their data. The intentions of the PSI Directive are diametrically opposed to this.

## **2. No sanctions for non-compliance with the processing period for applications**

A “sanction” is neither stipulated in the PSI Directive, nor in the IWG, in case the specified processing period is not complied with. As this involves a core issue of the PSI Directive<sup>3</sup>, the creation of a regulation would appear to have been advisable.

## **3. Non-regulation of access to Public Sector Information**

The biggest weakness of the PSI Directive is that access to information is not regulated<sup>4</sup>. As a result, access to public documents depends exclusively on the will of the particular responsible authority, in many cases. Thus there is no secure, commercial environment for interested companies, guaranteed by clear, legal regulations.

The access to information is so fundamental, that Austrian companies have already started searching for other ways to commercially achieve what the PSI Directive has formulated as a goal<sup>5</sup>. The Supreme Court (Oberster Gerichtshof) in Austria has already decided once as follows:

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<sup>2</sup> *Öhlböck*, Kommentar, 2008, S 57 – 60.

<sup>3</sup> KOM (2002) 207, Page 6; and recital 12.

<sup>4</sup> *Öhlböck*, Kommentar, Page 73.

<sup>5</sup> *Öhlböck*, Kommentar, Page 135 – 154.

*It must be regarded as misuse of the dominant market position if the producer of a database, which he can only use meaningfully under the condition that he is provided with the modified data necessary for updating, is refused access to the modified data without reasons or it is made dependent on paying an inappropriate fee, by a monopolistic producer of a database from which the modified data can be exclusively sourced.*

In this case, the Supreme Court used the decision by the European Court of Justice regarding Magill TV Guide (C-241/91, C-242/91) and IMS-Health (C-418/01) as a basis and applied the Essential Facilities Doctrine.

#### **4. Fee regulation unclear**

The regulation regarding fees in the PSI Directive is not clear enough<sup>6</sup>. The PSI Directive lists individual factors that can be considered during the calculation of the fee, without, however, putting these in concrete terms. This is particularly valid for the question of whether the public authority is permitted to apply its costs in full.

I would be pleased to continue supporting the European Commission with the Review and am at your disposal at any time for further questions.

Yours sincerely,



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Attorney at Law

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<sup>6</sup> Öhlböck, Kommentar, Page 103 – 113.