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ARTICLE

"Turning Government Data Into Gold": The Interface Between EU Competition Law and the Public Sector Information Directive—With Some Comments on the *Compass* Case

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Abstract This short article was triggered by the recently delivered preliminary ruling by the CJEU in the *Compass* case. The case is important since it raises difficult questions regarding when a public sector body should benefit from the application of EU competition law in general and is especially interesting for those public sector bodies that create the essential information needed for the growing public sector information industry. The main issue discussed in the article is when public sector bodies should be considered "undertakings" under EU competition law. The substantive issue of the case is whether the specific conduct under scrutiny, i.e. the distribution of public sector information for remuneration, is an economic activity or not. In light of the *Compass* case, the author argues that the underlying doctrine, derived from quite a number of CJEU cases, needs to be narrowed down and tightened so that public sector bodies are only exempted and considered as not conducting economic activities when the scrutinized activity truly constitutes an essential function of the state. The CJEU should thereby refine the current case law regarding the dichotomy between undertakings, which benefit from the application of competition law, and public or private bodies that perform acts of sovereign public power and connected conduct, which do not. EU competition law should prevail if a public sector body or a private body conducts an activity that creates or is conducted on a market, irrespective of whether that body simultaneously conducts a public task, as long as it is not an exercise of public power.

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1 Introduction

Every day, public authorities collect large amounts of information within the context of their public duties. To a great extent, such public sector information (PSI) was previously considered to be of no, or little, interest and often literally collected dust in some archives. However, this is rapidly changing. Digitized PSI is today a valuable commodity and recognized as a valuable source of income. Databases with PSI, such as the database for the land registry (Cadastre), the company registry, and public weather services, are valuable since there are many potential purchasers of the content as long as the information is accurate, up to date and easily accessible. These databases constitute the basis for "PSI markets" where PSI is made available to customers over the internet, often bundled together with other services and other digitized information. Providing access to PSI is a large and developing industry. The European-wide markets derived from PSI have been estimated to have a turnover of €30 billion per year and actually more than double in the United States.[1] The EU Commission has realized this, and, with the aim of tapping this resource by making PSI databases available to private undertakings that wish to compete with the authorities in providing PSI to customers, the EU enacted the PSI Directive in 2003.[2] The PSI Directive and the implemented national PSI Acts derived therefrom primarily concern facilitating the commercial re-use of such PSI on private markets.

It is clear that competition law plays an important role in the PSI Directive, as it has been a main source of inspiration. Cases like *Magill*[3] and *IMS Health*[4] reflect and presumably influenced the way the PSI Directive has been drafted. The PSI Directive spells out the terms on which the public sector body should make PSI available at the wholesale level to its private "competitors", when the public sector body sells PSI to end-users. In fact, the interface between the PSI legislation and general competition law is intriguing, especially the doctrine on abuse of dominance in reference to (i) refusal to supply, and (ii) exclusionary abuses when the dominant undertaking (or public sector body) has chosen to enter the (secondary) market in selling PSI to end-users.

One of the main difficulties of this interface is the different subjects addressed in the different legal systems. Under competition law the addressee is a dominant undertaking, while under the PSI Directive it is a public sector body. Even though the legal systems address different subjects, I intend to show that the underlying logic of the

[1] The literature regarding the PSI market size and impact often refers to the widely cited estimates in the MEPSIR study (2006). MEPSIR concluded that the market for re-use of PSI in 2006 for the EU25 plus Norway was worth €27 billion. MEPSIR (Measuring European Public Sector Information Resources), "Final report of study on exploitation of public sector information—benchmarking of EU framework conditions", Executive summary and final report Parts 1 and 2 (2006).

[2] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, (31 December 2003) *OJ* L 345, p. 90 *et seq.* (Hereinafter: the PSI Directive).

[3] Joined cases C-241/91 and C-242/91, *RTE, ITP & BBC v. Commission* 1995 *E.C.R.* II-485 (*Magill*).

[4] Case C-418/01, *IMS Health v. NDC Health* 2004 *E.C.R.* I-5039 (*IMS Health*).

PSI regulation actually implies that competition law requirements are also applicable to public sector bodies in the sphere of public tasks, and close to the exercise of public power, beyond what *Höfner*,[5] *Diego Cali*,[6] *SAT*,[7] *FENIN*,[8] and *SELEX*[9] once taught us.

Public sector information should actually trigger the interest of politicians, business representatives and scholars alike. Firstly, it concerns an area of society where it seems the EU Commission and Member States have different goals and objectives. This is reflected by the enthusiasm of the EU Commission in regulating PSI, on the one hand, and the contrasting disinterest of Member States' political representatives in implementing PSI regulations, on the other. Secondly, the PSI Directive already regulates great sources of wealth, which will be especially increased by the suggested amendments to the PSI Directive published by the EU Commission in December 2011. This should interest the business community and politicians alike. Thirdly, and finally, the PSI regulation is situated at the intersection of competition, copyright and ICT law, as well as triggering the constitutional right to access official documents, while also being the result of globalization and privatization. In other words, it touches on topics and issues which normally generate interest in the academic community.

This short article aims to discuss and analyze one of these intersections in more detail, the interface between the PSI legislation and the rules on abuse of dominance. Or, more specifically, the dichotomy between what constitutes an economic activity and what constitutes an activity inseparable from the exercise of public power under competition law. This will be discussed in light of the PSI regulation and the refusal-to-supply doctrine. This seems to be the main issue in the *Compass* case[10] and is what both the CJEU and AG Jääskinen are actually wrestling with. The *Compass* case will be discussed at the end of the paper.

2 Competition Law as a Source of Inspiration for the PSI Regulation[11]

Competition law plays an important role in regard to PSI and must have been a source of inspiration for the PSI Directive.[12] Abuse-of-dominance doctrines, such as

[5] Case C-41/90, *Höfner and Elser v. Macroton GmbH* 1991 *E.C.R.* I-1979 (*Höfner*).

[6] Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547 (*Diego Cali*).

[7] Case C-364/92, *SAT Fluggesellschaft mbH v. European Organization for the Safety of Air Navigation (Eurocontrol) E.C.R.* I-00043 (*SAT*).

[8] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria v. Commission* 2006 *E.C.R.* I-6295 (*FENIN*).

[9] Case T-155/04, *SELEX Sistemi Integrati SpA v. Commission of the European Communities E.C.R.* II-4803 (*SELEX*).

[10] Case C-138/11, *Compass-databank GmbH v. Republik Österreich* (12 July 2012) not yet reported.

[11] I base this section to some extent on the ideas put forward in a research report written by myself, Marc de Vries, Emma Linklater and Liisa Rajala Malmgren for the Swedish Competition Authority, "Business Activity and Exclusive Right in the Swedish PSI Act" (2011:2), available at: http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/uppdragsforskning/forsk_rap_2011-2.pdf. (Accessed 15 October 2012).

[12] As highlighted in recitals 1, 9, 20, 25 of the preamble to the PSI Directive.

predatory pricing and price discrimination, have presumably inspired the way the PSI Directive has been drafted. In addition, the refusal-to-supply cases, in which a dominant undertaking has been obliged to give access to information or a facility to an (often smaller) competitor on a secondary market reflects the idea behind, and the structure of, the PSI Directive. The main difference is, however, that under the PSI Directive, instead of a dominant undertaking, a public sector body would be conducting a public task that generates PSI, while also acting in a commercial role on a secondary market by providing access to the same PSI through a commercial branch. Then, the PSI Directive stipulates an obligation for the public sector body to provide access on, for lack of a better expression, FRAND[13] terms to undertakings wanting to sell PSI or PSI access in competition with the public sector body on the downstream market.[14]

Notwithstanding the above, the PSI Directive does not, at least not as it stands today, stipulate a right to access public information or to re-use public information. Such a right must be provided under national laws on accessing public information. Thus, the PSI Directive is without prejudice to national and EU rules on privacy protection, rules regarding business secrets, etc. Instead, the PSI Directive regulates, in essence, under what conditions private parties may compete with a public sector body on the downstream market, when the public sector body has decided to open a downstream market (i.e. to re-use the PSI). Under these conditions it aims to create a level playing field between the public sector body and the undertaking wanting to compete with the public sector body selling the same PSI.

Access must be granted on FRAND terms, so as to create a level playing field on the downstream market. Thus, an abuse such as marginal squeeze (*TeliaSonera*[15]) fits very well into the interface between the abuse-of-dominance doctrine and the PSI Directive. In marginal-squeeze cases, the PSI legislation acts rather as a *lex specialis,* or even as a *sector-specific regulation,* stipulating that a third party must be given access on similar terms to the public sector body's commercial branch which will be its competitor (cf. Art. 10(2) PSI Directive).[16]

That the PSI Directive acts as a *lex specialis* in these circumstances seems rather clear; however, a whole different story is whether access to PSI may be granted under the abuse doctrine concerning refusal to supply or license (using the same logic as reflected in *Magill*[17] and *IMS Health*[18]). The question is whether competition law, and more specifically the rules on refusal to supply or license, may be utilized as a way to access PSI from the public sector body.

Arguably, the logic behind the PSI Directive takes a step beyond competition law, and also infuses competition law principles in the sphere of public tasks and

[13] Abbreviation for fair, reasonable and non-discriminatory, *cf.* Arts. 6 and 10(2) PSI Directive.

[14] *Cf. supra* note 11, p. 11 *et seq.* and 20 *et seq.*

[15] Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* (17 February 2011) not yet reported.

[16] This does not imply that the PSI Directive should be regarded in its entirety as a sector-specific regulation.

[17] Joined cases C-241/91 and C-242/91, *RTE, ITP & BBC v. Commission* 1995 *E.C.R.* II-485.

[18] Case C-418/01, *IMS Health v. NDC Health* 2004 *E.C.R.* I-5039.

public entities' sovereign power, beyond what is stipulated in *Höfner*,[19] *Diego Cali*,[20] *SAT*,[21] *Bodson*,[22] *FENIN*,[23] *SELEX*,[24] and now finally *Compass*. It seems clear that the PSI Directive obliges a public sector body to observe competition law principles even though it is not an "undertaking", as long as it is acting outside the sphere of its public task. At least some parts of the PSI Directive are also applicable without the public sector body conducting a commercial activity, as long as the activity is, hence, outside its public task.

For competition law to be applicable, activities must be conducted by undertakings. Under current case law an "undertaking" encompasses every entity engaged in an economic activity regardless of legal status and the way it has been financed.[25] Offering goods and services on a given market is the characteristic feature of an economic activity.[26] The CJEU has even gone so far as to state that any activity consisting of offering goods and services on a given market *is* an economic activity.[27]

The CJEU has, however, narrowed down the notion of "undertaking" so that tasks in the public interest which form part of the essential function of the state, i.e. activities that are connected by their nature, their aim, and the rules on the exercise of power are per se "non-economic".[28] The CJEU even stated that indirect relationships between the scrutinized activity and the exercise of public power may render the otherwise "economic" activity "non-economic". It is not necessary for the activity concerned to be essential or indispensable to the activity that constitutes a public power. As long as the activity is connected to the exercise of public power it is "non-economic".[29, 30]

Notwithstanding the above, when the public sector body re-uses PSI by selling information to end-users, the PSI Directive is, of course, applicable. However, since

[19] Case C-41/90, *Höfner and Elser v. Macroton GmbH* 1991 *E.C.R.* I-1979.

[20] Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547.

[21] Case C-364/92, *SAT Fluggesellschaft mbH v. European Organization for the Safety of Air Navigation (Eurocontrol) E.C.R.* I-00043.

[22] Case 30/87, *Corinne Bodson v. SA Pompes funèbres des régions libérées* 1988 *E.C.R.* I-2479.

[23] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295.

[24] Case T-155/04, *SELEX Sistemi Integrati SpA v. Commission of the European Communities E.C.R.* II-4803.

[25] Case C-41/90, *Höfner and Elser v. Macroton GmbH* 1991 *E.C.R.* I-1979.

[26] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295.

[27] Cases C-180/98 to C-184/98, *Pavlov and Others* 2000 *E.C.R.* I-6451, para. 75. *See also* Case C-475/99, *Ambulanz Glöckner* 2001 *E.C.R.* I-8089, para. 19.

[28] Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547. *See also* AG Maduro's description of the current doctrine in *FENIN*. *Cf*. Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission*, opinion of Advocate General Poiares Maduro (10 November 2005).

[29] Case T-155/04, *SELEX Sistemi Integrati SpA v. Commission of the European Communities E.C.R.* II-4803, para. 79.

[30] For a comprehensive analysis of the prerequisite "undertaking", *see* Office of Fair Trading, "Public bodies and competition law: A guide to the application of the Competition Act 1998", especially p. 7 (OFT 1389, December 2011). Available at: http://www.oft.gov.uk/shared_oft/ca-and-cartels/OFT1389.pdf. (Accessed 15 October 2012).

the public sector body, according to the logic under the PSI Directive in these circumstances, provides an input (in fact sells PSI) for its own commercial branch, the issue is whether the PSI Directive in fact also "forces" public sector bodies under the current competition case law to become "undertakings".[31] Since the underlying method of the PSI Directive implies that there are also transfers for remuneration within the public sector body if the public sector body re-uses the PSI, the *FENIN* case[32] tells us that the public sector body is conducting a characteristic economic activity when re-using PSI under the PSI Directive in the transaction within the public sector body. If that is the case, the abuse of the refusal-to-access doctrine may become applicable under EU Competition law since the public sector body would thereby become an undertaking. This would in turn instil competition law, and not only competition law principles, within public sector bodies. This issue will be discussed in more detail below.

3 Some Remarks on the Interplay Between the PSI Regulation and Competition Law

The interface between the PSI legislation and general EU competition law, especially the rules on abuse of dominance in regard to (i) refusal to supply, and (ii) exclusionary abuses when the alleged dominant entity has chosen to enter the (downstream) market, is, to say the least, fascinating.[33] In fact, the interface between the PSI regulation and competition law is present both at the wholesale level (upstream) and at the level of selling PSI to end-users (downstream).

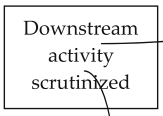
There is, in general, a three-step method of application under the PSI Directive: Step 1, was the PSI created and supplied for a public task? Step 2, is the PSI utilized (re-used) for a second purpose outside the original public sector body's public task for which it was created and supplied? Step 3, is this re-use a commercial re-use of the PSI? If all three steps are fulfilled, then the public sector body under the PSI Directive should make the PSI available on "FRAND" terms to third parties.

An example would be a digitized company register. In Europe, such a register has often been created and is maintained by a public authority because that authority has the *public task* of collecting this information and maintaining the register under the law of the respective Member State (which can of course be an implementation of an EU directive). Providing access to information in the company register may be within an authority's public tasks based on constitutional rights to access public information, but it may nonetheless also find it appealing to re-use this register,

[31] *Ibid*. Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295, paras. 25–26. Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547, paras. 22–23. *See* the OFT decision of 25 October 2002, *Companies House, the Registrar of Companies for England and Wales* (Case CP/1139-01).

[32] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295.

[33] In Sweden, a public sector body that provides access to PSI in a discriminatory fashion, or not at all, easily triggers the specific Swedish competition rule, found in Ch. 3, Sec. 27 SCA, regarding "abuse" by a public sector body.



Logic:	PSI Directive	Competition law	**Logic:**
Step 1	PSI originates from a **public task**, as defined by each MS, respectively, leading to the supply of PSI	**Undertaking**: the PSB's activities under scrutiny, e.g providing, and not providing access or a licence to end-users or others: an economic activity or an activity connected to exercise of public power	**Step 1**
First (i)	**Interface**	**Interface**	**First (i)**
Step 2	= **re-use** (by definition utilizing the PSI for a different purpose outside the public task)	Dominance? The sought-after PSI: can be utilized, or is it utilized on a **second market**? Is the PSB reserving a secondary market for itself	**Step 2**
Second (ii)	**Interface**	**Interface**	**Second (ii)**
Step 3	PSB re-uses PSI **commercially** outside public task	Is the PSI **indispensable**, that would be **not justifiable** to provide access? Prevent the apperance of a new product?	**Step 3**

although such re-use is not primarily its public task, by providing access to it over the internet as a service to end-users for remuneration. If this is the case, the PSI Directive could easily be applicable and the public authority would be obliged to provide access to the register on FRAND terms.

Interestingly, the competition law doctrine on refusal to supply works somewhat the other way around. Firstly, it is the downstream activities that need to be analyzed in respect of whether there is an economic activity. Is the activity under scrutiny an economic activity? Is it a commercial activity conducted on a market? This may only be established if the end-market where the body is dealing with its "customers" is scrutinized. So is a public sector body an "undertaking" under competition law when actively giving end-users access to the PSI for remuneration? That may only be established if the actions on the downstream market are analyzed. Otherwise, it is difficult to make out whether the activity of excluding an undertaking or competitor, by refusing to license or supply the PSI upstream, is an economic activity or the exercise of an essential function of the state. That is step 1 under the competition law doctrine on refusal to supply or license (cf. discussion *infra*).

Thereafter, generally speaking, the other requirements under the rules on refusal to supply or license need to be scrutinized by going up the ladder. Step 2, is the undertaking dominant? Is there even a second (downstream) market that the public sector body is reserving for itself? Step 3, is there an elimination of competition and the prevention of the appearance of a new product under the case law of *Magill*, *IMS Health*, and *Microsoft*? Finally, is the PSI an indispensable input under the same line

of case law? If all these questions are answered in the affirmative, transferring PSI from the non-economic sphere, i.e. the sphere that forms part of the essential function of the state, to the commercial arm of the public sector body itself could be such an economic activity that triggers the application of the refusal-to-supply doctrine. Thus, the abuse-of-dominance rule should be applicable.

The *Magill*[34] "logic" works well in such a PSI setting as depicted above: publicly owned entities (in the *Magill* case BBC and RTE et al.), engaging in their primary market or public task (producing and distributing TV programmes), create public information, i.e. PSI (in the form of TV listings). Under the rules on abuse of dominance, they are required to provide access to this information (PSI: the TV listings), due to its indispensability and that a refusal would be unjust, to an undertaking that would create a new product (TV guides). Thus, in the *Magill* case, the appellant was not allowed to reserve a secondary market for itself.

The question is however whether the "public-power exemption" defined in the *Diego Cali*,[35] *SAT*,[36] *FENIN*,[37] and *SELEX*[38] case law development will prevail in these situations. Clearly, a PSI setting implies that we are dealing with activities that might be very close to the core activities of the scrutinized public sector body. The PSI is created as a public task of the public sector body. This line of case law stipulates in essence that each activity of the public sector body needs to be analyzed separately to identify whether it is a commercial activity or not (a functional approach). Thus, a public sector body can be an undertaking in certain aspects and a state actor in other aspects, depending on the activity under scrutiny.[39] Likewise, a private body, which has been granted a concession or task by the state, may act as a state actor or as a commercial actor depending on what activity is scrutinized. However, the scrutinized activity must be an activity conducted on a market, presumably a downstream activity or transaction. Irrespective of whether the actor is public or private, the question to be analyzed is whether the activity

[34] Joined cases C-241/91 and C-242/91, *RTE, ITP & BBC v. Commission* 1995 *E.C.R.* II-485.

[35] Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547.

[36] Case C-364/92, *SAT Fluggesellschaft mbH v. European Organization for the Safety of Air Navigation (Eurocontrol) E.C.R.* I-00043.

[37] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295.

[38] Case T-155/04, *SELEX Sistemi Integrati SpA v. Commission of the European Communities E.C.R.* II-4803.

[39] I would therefore state that, if necessary, the *Bodson* case needs to be refined. A concession in itself should not render a body's activities exempt under EU competition law. The court still needs to conduct a test of the respective activity or conduct as to whether it was a task that forms part of the essential function of the state or not. This method needs to be harmonized at an EU level. Otherwise, the Member States have a prerogative of whether general competition law would be applicable, or not. It seems rather odd if a Member State can circumvent EU competition law by granting a concession so that the grantor of the concession, and perhaps even the concessionaires, would automatically be exempted under competition law. The decision of the Member State to privatize services that were previously performed by the Member State should, of course, have some ramification even if the privatized entity's business is connected or conducted under the veil of the Member State. Likewise, if after the privatization the Member State has economic arrangements with the private entity, for example, by selling PSI to that entity, this would imply that both the private entity and the Member State in these transactions must be regarded as conducting economic activities, and, hence, competition law should become applicable.

under scrutiny is an economic activity or an activity so inseparable from the exercise of public power that it cannot be regarded as an economic activity.[40]

As discussed below, the method of defining the "public-power exemption" under competition law should be coherent and harmonized throughout the EU. Thus, it would be unfortunate if the notion of what constitutes sovereign power and indispensable connected activities would have a different meaning in different Member States. The statement by the court in the *FENIN* case needs to be mentioned in this connection: that an activity consisting in offering goods and services on a given market is the characteristic feature of an economic activity.[41]

This contrasts to the PSI Directive whereby the content and definition of a "public task" is the explicit prerogative of the Member States. The content of a "public task" is dependent on what tasks the government assigns to the public authority or the undertaking. Furthermore, exemptions under competition law should normally be interpreted narrowly; hence, only activities in close connection to the exercise of public power may qualify under the exemption. Acts of public power and activities connected thereto under competition law should therefore, presumably, cover fewer activities than a "public task" under the PSI Directive, and not the other way around. Public sector bodies may conduct activities that are not a reflection of public power. Activities that may be viewed as expressions of public power normally imply, at least, some kind of change of legal status or other materialization of a legal consequence directly connected to the activity. A public task could be defined as any activity the public sector body should conduct according to the state government and under the applicable constitution. Clearly, public sector bodies in Europe conduct numerous activities that are not acts of public power, but rather acts of public service or social service. The difference between acts of public power and public tasks is especially clear if the activity is both a public task and a commercial or economic activity. In these cases, the public sector body may have the public task (perhaps ordered by the government) of acting on the market like any other market participant. The acts conducted are not then reflections of public power. The PSI Directive is applicable when PSI is created as a public task and re-used afterwards outside the public task, while competition law is applicable as long as the activity scrutinized is an economic activity and not inseparable from the exercise of public power.

4 Three-Step Logic Revisited

In light of the above, the underlying logic of the PSI Directive actually has the effect of applying competition law to public sector bodies. The logic is that public sector bodies are divided up. They sell PSI to their own commercial branches, which would, most likely, oblige the public sector bodies to observe competition law

[40] Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547, paras. 22–23.

[41] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295, para. 25.

principles according to the PSI Directive. But, and this is the intriguing part, it also implies that a public sector body, in its production and transfer of PSI, becomes an undertaking according to *Höfner*[42] and *FENIN*.[43]

Hence, if a public authority provides access to its company register to end-users for remuneration that is considered to be an economic or commercial activity under competition law, the transfer or re-use of the PSI database from the public branch of the public sector body to its own commercial branch may itself be an economic activity. Transfer or re-use needs to be a "transfer", whereby access with the right to provide sub-access is transferred from the sphere where the public authority is conducting its public task to the sphere where it is providing access to the company register for remuneration outside its public task (cf. Art. 10(2) PSI Directive).

Since, as stated above, the public authority, according to the logic of the PSI Directive, provides an input (in fact sells PSI) to its own commercial branch, which uses it outside the scope of the public authority's public task, the PSI Directive, de facto, forces the public authorities to become undertakings under general competition law even in their internal transactions. The only loop-hole being whether the activity of "re-use" is within the public-power exemption under competition law as established and explored under the case law described above.[44] But the loop-hole would never or seldom be applicable given that the public-power exemption should be interpreted consistently and narrowly under competition law, presumably incorporating fewer activities and situations than the term "public task" under the PSI Directive.

5 Some Comments on the *Compass* Case

The *Compass* case revolved around the issue of whether the doctrine of refusal to license or supply, under the abuse-of-dominance rules, was applicable when Austria refused to provide access to the digitized Austrian Company Register to the limited company Compass-Databank GmbH (Compass) so as to enable it to sell access to or information provided in the register to customers, if not in competition, at least in parallel, with the agencies assigned by Austria to provide access to the register. The CJEU found that Compass would not be able to invoke the doctrine of refusal to license or supply because, when making the Austrian Company Register available to the public, Austria was conducting an inseparable activity or service from the exercise of public power of collecting the data for the register. Hence, Austria did not, according to the CJEU, in these situations, function as an undertaking under EU competition law.

[42] Case C-41/90, *Höfner and Elser v. Macroton GmbH* 1991 *E.C.R.* I-1979.

[43] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295.

[44] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295, paras. 25–26. Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547, paras. 22–23. *See* the OFT decision of 25 October 2002, *Companies House, the Registrar of Companies for England and Wales* (Case CP/1139-01).

The *Compass* case is illustrative for a discussion regarding the interface between competition law and the PSI regulation. The PSI regulation has so far gone unnoticed by competition law practitioners and scholars but works as a *lex specialis* or even as sector-specific regulation in respect of the PSI industry.

The issues discussed above were reviewed in the *Compass* case.[45] The main issue at hand was whether competition law or, specifically, the refusal-to-supply doctrine was applicable in regard to obtaining access to the company register in Austria. The private company Compass wanted to obtain raw data on a continuous basis from the company register to sell to its customers by bundling this information together with other data in its own database. Access to customers would be provided on the website of Compass. The company register was maintained by the Austrian State and, while access to information from the register has historically been obtainable through Austrian courts, since 1999 several private agencies have also been selected to provide access to the register via the internet.[46] The agencies obtain a fee or remuneration from the users of this service but are limited by the Austrian State, by virtue of its sui generis intellectual property right to the database, to provide only access to the register and not to bundle the register together with other services.

Unfortunately, the Austrian court did not consider application of the PSI Directive.[47] The CJEU also refused to invoke or find inspiration from the PSI Directive or the Austrian implementation of the PSI Directive. The CJEU held that the PSI Directive in recital 9 states that the Directive does not contain any obligation to authorize re-utilization of documents; in addition, access to the company register was not covered by the Austrian implementation of the PSI Directive.[48] Advocate General Jääskinen stated that the PSI Directive may be used for inspiration and guidance but then implicitly found that the public sector body in this case had produced, reproduced and disseminated the information through the agencies in order to fulfil its public task. Hence, the PSI regulation could not be applicable since there was no re-use but only use of the company register.[49]

The CJEU's justification for not applying the PSI Directive seems somewhat odd. The PSI Directive does not oblige the authorization of re-use according to recital 9, but can only be understood that the Member State or the relevant public sector body has a prerogative under the Directive to re-use or not to re-use the PSI. If it does not

[45] Case C-138/11, *Compass-databank GmbH v. Republik Österreich*, Opinion of Advocate General Jääskinen (26 April 2012).

[46] According to the *Compass* case, Compass did actually market access on the internet. Compass seems to have been, de facto, granted access by default to the company register from 1984 until 2001. Compass could thus possibly have claimed that the Austrian government refused to supply an old customer, *e.g.* under the *Commercial Solvents* case law. *Cf.* Cases 6 and 7/73 *Commercial Solvents Corp. v. Commission* 1974 *E.C.R.* 223. *See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp*. 472 U.S. 585, 105 S.Ct. 2847, 86 L. Ed.2d 467 (1985).

[47] *See* Case C-138/11, *Compass-databank GmbH v. Republik Österreich*, Opinion of Advocate General Jääskinen (26 April 2012) paras. 21–22.

[48] Case C-138/11, *Compass-databank GmbH v. Republik Österreich* (12 July 2012) not yet reported, para. 50. *See also* Case C-138/11, *Compass-databank GmbH v. Republik Österreich*, Opinion of Advocate General Jääskinen (26 April 2012) paras. 21–22.

[49] Case C-138/11, *Compass-databank GmbH v. Republik Österreich*, Opinion of Advocate General Jääskinen (26 April 2012) para. 36 *et seq*.

re-use the PSI, there is no duty under the PSI Directive to re-use it. However, if the public sector body has indeed started to re-use the PSI, i.e. use it outside the original public task for which it was produced or supplied, the public sector body is, on the contrary, obliged under the PSI Directive to provide access to the PSI on equal terms. This seems to be the only plausible interpretation of recital 9 and Arts. 1, 10(2), and 11 of the PSI Directive. Thus, if the transfer of PSI to the agencies from the Austrian State in this case could be considered a re-use under the PSI Directive, the PSI Directive should have been applicable.[50]

Indeed, it is unfortunate that the Austrian court, and thereby the CJEU, did not explicitly consider application of the PSI Directive.[51] Notwithstanding the above, it may now be questioned whether a Member State, under the PSI Directive, may exempt certain PSI, e.g. the company register, from national PSI legislation altogether.

The issue discussed by the CJEU and AG Jääskinen was instead whether Austria's activities may be regarded as commercial under the prerequisite "undertaking" pursuant to general EU competition law. The dissemination of the register on the internet was done through private agencies, providing access to the Austrian company register in, what seems to be, competition with each other, but this still did not imply, according to the CJEU, that the Austrian State was acting commercially. The CJEU did not discuss the agencies at length but focused on the transfer from Austria to the agencies. In contrast, according to Jääskinen, the agencies were acting under public service concessions and should be included in the notion of the state.[52] It was therefore only of interest to analyze the activities of the Austrian State including the activities of the agencies. Confusingly, the CJEU made specific reference to Jääskinen in this regard and stipulated that the activities of the Austrian State and the agencies should not be confused. All in all, both the CJEU and the AG disregarded the agencies albeit on different grounds.

To what extent would Austria in this regard be considering to be acting as an undertaking, i.e. conducting an economic activity?

According to the CJEU, the activity of collecting data in relation to undertakings, on the basis of a statutory obligation on those undertakings to disclose the data and the powers of enforcement related thereto, falls within the exercise of public powers. As a result, such an activity is not an economic activity. Equally, an activity consisting in the maintenance and making available to the public of the data thus collected, whether by a simple search or by means of the supply of print-outs, in accordance with the applicable national legislation, also does not constitute an economic activity, since the maintenance of a database containing such data and

[50] It seems that AG Jääskinen was of this opinion. *Cf.* Case C-138/11 *Compass-databank GmbH v. Republik Österreich*, Opinion of Advocate General Jääskinen, 26 April 2012, para. 71.

[51] It seems that the Austrian court had already arrived at the conclusion that the Austrian PSI Act was not applicable, *see* Case C-138/11, *Compass-databank GmbH v. Republik Österreich*, Opinion of Advocate General Jääskinen (26 April 2012) paras. 21–22. Nonetheless, the explicit Austrian exemption of the company register from the national implementation of the PSI Directive seems questionable.

[52] *Cf.* Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547, para. 15 *et seq*.

making that data available to the public are activities that cannot be separated from the activity of collecting the data.[53]

With regard to the fact that making the data available to persons interested in such a database is remunerated, the CJEU noted that

> in conformity with the case law, to the extent that the fees or payments due for making such information available to the public are not laid down directly or indirectly by the entity concerned but are provided for by law, the charging of such remuneration can be regarded as inseparable from making that data available. Thus, the charging by Austria of fees or payments due for making that information available to the public cannot change the legal classification of that activity, meaning that it does not constitute an economic activity.[54]

The *Compass* case, then, seems unique in some aspects. Firstly, in previous cases the starting point of the analysis, at least, was the downstream activity, i.e. the service provided to the public or to customers. For example, in *Ambulanz Glöckner*, it was the ambulance activities under scrutiny, not the activity of providing Ambulanz Glöckner with potential patients to pick up. Likewise, in *Diego Cali*, it was the conduct, under exclusive concession, of the SEPG, i.e. the antipolution service in the port of Genoa, that was scrutinized, not the concession or assignments from the public to the undertaking conducting the service. In the *Compass* case, the comparable activity would have been the activities of the agencies. It is not entirely clear from the judgement, but the CJEU disregarded the agencies and only scrutinized the Austrian State. Possibly, the CJEU was making this too easy for itself. Can Member States circumvent competition law by outsourcing the end-service, i.e. the commercial dissemination of PSI? The agencies seem to be autonomous entities that are able to set their own prices vis-à-vis the public, while having to pay the same fee to the Austrian State. They are likely to be undertakings and the Austrian State provides them with an input. They conduct the "public task" of disseminating PSI on behalf of the Austrian State, but for them it presumably was a commercial activity.

The CJEU's over-zealous focus on the fact that the system is set up under the laws of Austria lacks a refined dichotomy between the conduct of public tasks and the exercise of public power. Clearly, public sector bodies must act under and in accordance with the laws of the Member State, but that does not imply that every activity conducted by a public sector body is an act of public power. On the contrary, public bodies in several Member States have, as part of their (public) tasks under the laws of the Member State in question, the obligation to conduct commercial or economic tasks, i.e. to act as participants on markets. These public sector bodies should then be considered undertakings when conducting such activities even though these tasks were set by the government. Indeed, if this were not the case Member States may through legislation shelter anticompetitive

[53] Case C-138/11, *Compass-databank GmbH v. Republik Österreich* (12 July 2012) not yet reported, para. 41.

[54] *Id.*, at para. 42.

economic activities conducted by public bodies from the ambit of EU competition law.

Advocate General Jääskinen made a different and detailed analysis. According to Jääskinen, three activities needed to be scrutinized to establish whether Austria was acting commercially: (i) storing data in a database; (ii) allowing inspections and/or printouts to be made from the register in return for payment; and (iii) prohibiting re-utilization of the information contained in the undertakings register. None of these were, according to Jääskinen, an economic or commercial activity and thus competition law could not be applicable.[55] According to Jääskinen, the activities of the agencies were indivisible from the activities of the state, making it unnecessary to analyze the transfer from the state to the agencies.[56] The CJEU disregarded the agencies and stated that the Austrian government cannot be confused with the agencies. These seem to be opposing opinions. Nonetheless, Jääskinen still found the agencies to be acting under concessions, rather than being agents, and also conducting economic activities.[57] It seems that AG Jääskinen would agree that competition law could be applicable to the agencies, but acting under concessions made the public-power exemption available to them.

If this is the right interpretation of Jääskinen's standpoint, the Austrian State is thereby conducting "economic" activities through the agencies, while under the current case law[58] it may still be "exempted" if those economic activities, and the activity of transferring data to the agencies, are indivisible from the exercise of public power, which is inherent in the concession.[59]

The AG focused on the concession and included the agencies within the notion of the Austrian State. Clearly it seems that the Austrian State in this case delegated the dissemination of the company register via the World Wide Web to these agencies. In the case law regarding the "public-power exemption", a concession in itself has never rendered the private body's (concessionaire's) activities exempted under competition law. The court still needs to conduct a case-by-case test of the respective activity as to whether the task forms part of the essential function of the state.[60] In the *Compass* case, this would imply scrutinizing the transfer of PSI from the Austrian State to the agencies.

[55] Case C-138/11, *Compass-databank GmbH v. Republik Österreich*, Opinion of Advocate General Jääskinen (26 April 2012) para. 43.

[56] *Id.*, at para. 56.

[57] *Id.*, at para. 34.

[58] *E.g.* Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547, para. 15 *et seq.*

[59] Somewhat consistent with the *Diego Cali* and *Bodson* cases, while in the *Ambulanz Glöckner* case, where a health organisation to which the public authority had delegated the task of providing public ambulance services was held to be an undertaking. The court in that case focused on the nature of the activity and stated that any activity consisting of offering goods and services on a given market is an economic activity. Ambulance services were not necessarily carried out by public authorities and were actually carried out on a market, albeit facing limited competition. *Cf.* Case C-475/99, *Ambulanz Glöckner* 2001 *E.C.R.* I-8089.

[60] *Cf.* Case C-343/95, *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* 1997 *E.C.R.* I-1547, para. 15 *et seq.*

Secondly, in the end, the CJEU held that Austria may claim a sui generis intellectual property right to the company register but still claim not to conduct a commercial activity. This is also a rather unique clarification. At least under some Member States' intellectual property laws this seems contradictory given that public sector bodies may assert an intellectual property right to a work or database only in those cases when specifically acting on a market and when conducting an economic activity, and never otherwise.[61]

Thus, I think that after the *Compass* case the doctrine on the interface between public power and connected activities and economic activities needs to be refined. The CJEU should put a method in place. I suggest that, at least in the area of PSI, some inspiration could be taken from the PSI Directive and the CJEU should view creation, collection, and finally dissemination of PSI as separate activities, i.e. (i) analyze the activities and conduct of the downstream actors (in the *Compass* case, the agencies) based on whether they are conducting an economic activity or not; (ii) whether the transfer (of data) to these actors is an economic activity that would also render the state to be an undertaking; and (iii) whether these activities are truly objectively inseparable, indispensable, from the exercise of public power.[62] These issues are interrelated. If the downstream actors are undertakings under *Höfner*[63] and *FENIN*,[64] then it is likely that the state also acts as an undertaking when selling input to these actors, irrespectively of whether this is done in accordance with their public tasks. Furthermore, if the public sector body claims an intellectual property right to the database, this might be an indication that it has a commercial purpose for the database.

From the *Compass* case it is difficult to predict how this analysis will come out. The CJEU disregards the agencies even though they are actors disseminating the PSI on the World Wide Web on behalf of the Austrian State. Clearly, from Jääskinen's writing, the agencies are not agents under competition law since they took a commercial risk when selling PSI.[65] It therefore seems that the CJEU, firstly, should rather have analyzed whether the agencies were undertakings, and, secondly, whether they fell under Art. 106 TFEU. Then the activity of transferring data to these agencies from the Austrian State should be examined.

Nonetheless, it may be that the CJEU reached the right decision in light of the current development of case law. If the activities of the Austrian State in transferring data to the agencies are not economic activities, but rather activities connected to the exercise of public power, i.e. "non-economic" activities, then Art. 102 should not be applicable under the current case law.

However, *de lega ferenda,* this would limit competition law excessively. It seems plausible to interpret Austria's choice to start disseminating the company register on

[61] *See* for example the Swedish Copyright Act, Ch. 2, Sec. 26a.

[62] Perhaps also: (iv) whether they truly reflect a natural monopoly to be enjoined by the state.

[63] Case C-41/90, *Höfner and Elser v. Macroton GmbH* 1991 *E.C.R.* I-1979.

[64] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission* 2006 *E.C.R.* I-6295.

[65] Commission notice—Guidelines on Vertical Restraints, (19 May 2010) *OJ* C 130, p. 1 *et seq*., para. 12 *et seq*.

the internet in 1999 through private agencies, where they can charge a fee that renders a profit if they perform well in relation to other agencies, to be such activities that would benefit from the application of competition law. These agencies could be viewed as acting on the market. The Austrian State provides them with access to the company database and charges them a fee for this access. By denying access to Compass, the Austrian State is reserving a secondary market for itself. Compass would probably not have competed with the agencies but would instead have added services and been active on a separate PSI market. The company register would presumably be indispensable for this new service to materialize; while, upstream, the Austrian state would be considered dominant.[66]

EU competition law should take inspiration from the PSI Directive's three-step method where even within a public sector body there is a division between the public-task side and the commercial side. On the public-task side, for example, data is collected through a system where undertakings are obliged to send company information, such as new board members, share capital etc., to the public sector body. Sending in such data may have direct legal consequences for the undertaking and persons in question. There is a change of legal status. The undertaking must pay a fee to have the information registered in the company register. All these activities are, of course, either a reflection of public power or thereto indispensable connected activities. Likewise, the often constitutionally protected right to be granted access to public documents and the corresponding duty or activity of the Member State to provide access to public documents, for a fee, are activities inseparable from the essential function of the state.[67] All these activities are "non-commercial". However, dissemination of company data for remuneration by giving direct 24-hour access to search the database online over the internet, possibly bundled with other data, is neither an exercise of public power, nor an activity connected to public power. It is a service based on input from the public, but not necessarily a service that can only be performed by or on behalf of a public body. Thus, in these cases the digitized public documents are a source of wealth, an asset, and the public sector body is not performing a function of the state. It is an additional commercial activity separable both from the registration of company data in the company register and the constitutional right to access certain information or public documents.

6 Conclusion and Some Final Comments on the Interface Between the PSI Regulation and Competition Law

The PSI industry and the PSI regulation are dynamic areas of society and law. The basis for the PSI industry is access to public, free, non-confidential, government data. Without such data the industry cannot develop. Notwithstanding this, public

[66] For example, in *IMS Health* the dominant firm was considered to be acting on a hypothetical copyright market from the copyright-protected "grid", *Cf.* Case C-418/01, *IMS Health v. NDC Health* 2004 *E.C.R.* I-5039, para. 34 *et seq*.

[67] Under the Austrian system, access by Austrian and EU citizens (and others) under the constitutional right to free access was granted by and through the Austrian courts, whereby one could access and copy relevant company register details.

sector bodies need to finance their production of PSI and should also benefit from being able to disperse PSI to the public. Public sector bodies should be able to sell PSI in competition with private undertakings. Private undertakings should, when competition law or the PSI Directive is applicable, be able to compete with public sector bodies on a level playing field.

The rather sophisticated legal weighing of interests needed to create a level playing field entails the application of competition law and/or the PSI Directive.[68] In contrast, the rules on the free movement of goods and services do not encompass a method for such a rather sophisticated analysis. If the reasoning of the CJEU in *Compass* would reflect the now prevailing doctrine, a Member State that acts in accordance with Austria's conduct in *Compass* is now at risk of being scrutinized under the rules on free movement in the TFEU. I wonder if that is really a beneficial development for any party. At least from the point of view of the Member States, the PSI regulation and competition rules are much more sophisticated and elastic then the rather crude rules on free movement. For example, would it not be likely for a court to establish that the refusal to provide PSI could at least potentially restrict trade or limit the possibility for an undertaking to provide a service or establish a violation of TFEU Arts. 34 or 49, 56? What exemption would then be available for the Member State? It seems that the free-movement rules are both more easily triggered than competition rules, while under the free-moment rules the burden of proof on the defendant seems to be greater than under TFEU Art. 102.

We have probably not seen the full force of what the EU legislature can do with the PSI Directive. Nonetheless, the PSI rules and competition law could very well work in parallel, almost symbiotically, so as to boost competition law principles in PSI markets. In other words, introduce competition in the service of commercially disseminating PSI, both in relation to public sector bodies and to undertakings providing PSI. The interpretation of "undertaking" under competition law should not prevent such a development.

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[68] For example, even if the PSI Directive had been applicable in the *Compass* case (the Austrian PSI Act did not encompass the company register and was thus not applicable), all actions and conduct by the Austrian State and the agencies were conducted within their public tasks, rendering the PSI Directive (also) non-applicable on this ground.