RE-USE OF PSI AND THE UNDERTAKING CONCEPT IN EU COMPETITION LAW

- With a focus on the possibility to re-use public documents under Directives 2003/98/EC and 2013/37/EU this Thesis analysis if and when a Public Sector Body becomes an undertaking under EU competition law when re-using PSI and would risk abuse its dominant position in contradiction to Article 102 TFEU by refusing to allow re-use of PSI to the prejudice of private undertakings wanting to compete with the Public Sector Body

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Thesis combined with practical experience in European Law, 30 HE credits
Examine: Claes Granmar
Stockholm, Autumn term 2013
Dear reader,

After being admitted to the law programme in 2010 I had the preconception that the other students had a capability that exceeded my own and that I was going to experience a harsh and highly competitive study environment. Not to mention the conservative professors with pointers and monocles. I was profoundly wrong. During my time as a law student I have had nothing but warm, creative and modern experiences. Foremost, I have made friends for life. I have also learned that hard work and a genuine interest for a given subject can be an unparalleled force to acquire and deepen your knowledge.

The last year I have solely studied the laws that govern the internal market within the EU, the majority of which I have dedicated to EU competition law. I find the subject intriguing. I am confident that market actors increasingly will become aware of this area of Union law in the accessible and globalised market we experience today, not least the abuse of dominance provisions. Although I am interested in many aspects of EU competition law I have this time turned to public bodies and the value they possess in the form of information they generate in carrying on their public duties – Public Sector Information. Public bodies are not exempted from the competition rules just because of their public status and it is equally important that such entities are aware of their responsibilities on the market.

With the submission of this thesis I finish four and half years of law studies at the faculty of law, Stockholm University. I want to thank the extremely competent EU and competition law departments at the Swedish law firms Lindahl and Vinge for inspiration and practical experiences. I also want to express my gratitude to my former teachers Björn Lundqvist and Vladimir Bastidas for inspiring teaching during my term with special courses in EU and competition law in the spring of 2013.

Especially, Anders Karlsson, Dino Susic, Freddie Arnesson and Sebastian Hesam – my friends; the following is dedicated to you.
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SUMMARY

This Thesis deals with how private companies can get to re-use public sector information (‘PSI’) without prior authorisation from the public sector body holding the PSI. Firstly, it scrutinises the current PSI Directive, Directive 2003/98/EC, to get an understanding of the limited scope it provides to re-use PSI in the absence of authorisation from the public sector body. Secondly, the Thesis explores the undertaking concept as case law from the EU Courts stands today. With the hypothesis that a public sector body can be deemed an undertaking under EU competition law in a PSI setting, the undertaking concept is thoroughly examined and discussed throughout the Thesis. If such bodies could be undertakings, there would, consequently, exist another possibility for private companies to get to re-use PSI – by applying the refusal to supply or license doctrines. Lastly, the Thesis examines the New PSI Directive, Directive 2013/37/EU, and discusses its scope for re-use of PSI.
SAMMANFATTNING

# ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>PSI</td>
<td>Public Sector Information</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>TFEU</td>
<td>The Treaty on the Functioning of the European Union</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>AG</td>
<td>Advocate General</td>
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<td>EUR</td>
<td>Euro</td>
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<tr>
<td>EU25</td>
<td>Member States of the European Union between 1 May 2004 to 31 December 2006</td>
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<td>FBG</td>
<td>Firmenbuchgesetz</td>
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<td>IWG</td>
<td>Austrian law implementing the PSI Directive</td>
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1. INTRODUCTION

1.1 General

Public authorities generate large amounts of information continuously in their various day-to-day activities. Public Sector Information (“PSI”) can be defined as the wide range of information that public sector bodies’ collect, produce, reproduce and disseminate in many different areas of activity while accomplishing their public duties and public tasks. Among others, PSI may include social, economic, business, cadastral, geographical, weather and tourist information, the nature of which can be, for instance, statistics, different models, registries, surveys and forecasts. PSI will even include the digital holdings of public libraries. Products and services that can be developed from PSI by combining information from different sources, making mash-ups and new applications are vast in variety and with great potential. According to a survey on existing findings on the economic impact of the PSI industry conducted by the European Commission in 2011 the overall direct and indirect economic gains are estimated to be EUR 140 billion throughout the EU. Moreover, the annual turnover for European-wide markets derived from PSI was in 2006 estimated to be EUR 30 billion. Data that form the basis for PSI markets are evidently valuable resources.

With the objective to utilise this resource by making PSI data available to private undertakings wanting to compete with authorities in making PSI available to customers, the EU enacted in 2003 the PSI Directive. The PSI Directive establishes a minimum set of rules governing re-use and practical

1 Article 2(1) of Directive 2003/98/EC defines public sector bodies as ‘the State, regional or local
2 See recital 14 of Directive 2013/37/EU.
3 Subsequently referred to as the Commission.
5 MEPSIR (Measuring European Public Sector Information Resources) concluded that the direct PSI re-use market in 2006 for the EU25 plus Norway was worth EUR 27 billion. MEPSIR (2006), Final report of study on exploitation of public sector information – benchmarking of EU framework conditions, Executive summary and Final report Part 1 and Part 2.
7 Article 2(4) of Directive 2003/98/EC defines re-use as ‘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’.
means of facilitating re-use of documents held by public sector bodies. The Commission has later recognised that the PSI Directive no longer keep pace with the rapid evolution in technologies for analysis, exploitation and processing of data. A new revised PSI Directive has therefore been proposed to, presumably, avoid the risk of social and economic opportunities offered by re-use of public data being missed. After the plenary Parliament vote held the 11th of June 2013 The New PSI Directive will have to be transposed in 24 months from the date of entry into force, which mean it should be in force across the EU toward the end of 2015.

1.2 Purpose and Question Formulation

The PSI Directive, as it stands today, does not contain an obligation for public sector bodies to grant access and to allow re-use of PSI. It is also questionable if the future amendments in the New PSI Directive stipulate a clear such obligation.

Competition law plays an important role with reference to the future development of a PSI industry. Seemingly, how the PSI Directive is constructed is inspired and built according to established competition law principles. However, there is a dichotomy regarding the interface between competition law and PSI; the two legal systems have different addressees. Under competition law the addressee is an undertaking and under the PSI Directive the addressee is a public sector body. Nevertheless, nothing implicate that a public sector body cannot be classified as an undertaking under EU competition law and thus be subject to that legal system as well as the one of PSI.

The current PSI Directive does neither, as it stands today, stipulate a clear right to access public sector information nor a right to re-use such information. Right to access PSI is instead regulated by the Member States’ national laws on access to public information and it is up to the Member States or the public sector body concerned to authorise re-use; the PSI Directive does not impose on national and EU rules on privacy protection, protection of

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9 See e.g. recital 20 and Articles 7-8 and 11.
10 See recital 9.
business secrets, etc. The PSI Directive instead sets conditions under which private parties may compete with the public sector body on a downstream market when and if the public sector body has decided to open such a market (i.e. to re-use the PSI generated in carrying on its public operations). Since the PSI Directive sets the boundaries for stimulating competition on the merits and facilitating re-use on a downstream market, e.g. obligation to grant access to that market on non-discriminatory terms and not to engage in margin squeeze practises, the PSI Directive, presumably, acts as *lex specialis* in these circumstances. However, obvious elements that are necessary to exploit the potential of PSI are those of allowing re-use and licensing in the first place. The question this Thesis broadly aims to explore is, therefore, the how can a private company be allowed to re-use PSI? More specifically, three questions will be dealt with, which are the following:

(i) What is the current scope of re-use under the PSI Directive?
(ii) Under what circumstances can a public sector body be classified as an undertaking under EU competition law in a PSI setting and trigger the application of the refusal to supply doctrine developed under Article 102 TFEU?
(iii) Does the future amendments to the PSI Directive give private companies greater possibilities to get allowed to re-use PSI?

1.3 Method and Material

It is elaborated below that this Thesis only analyses the research questions posed above from a EU perspective. Therefore, methods and materials of this Thesis are predominantly affected by the EU legal system.

1.3.1 Method

Regarding the research method of this Thesis, it should first be recalled that the concept of the EU goes beyond an international treaty. With EU institutions with competences and the Court of Justice of the EU (“CJEU”) to supervise these competences and conducts of the Member States, the EU constitutes a
unique legal order based on the rule of law. The jurisprudence developed by the CJEU is thus a crucial element in interpreting the EU Treaties. However, when interpreting the Treaties, the Court must respect the relationship between the EU institutions, their competences and the Member States.

The method I use is, in broad terms, a teleological interpretation of EU law, i.e. a purpose driven interpretation of the relevant legal rules. In the context of EU competition law, such purposes are, presumably, the notions of the proper functioning of the internal market, consumer welfare and economic efficiency. Therefore, in analysing the argumentative patterns in case law and legal writing, I try to identify the various purposes of the source in order to come to conclusions with regard to my research questions that teleologically are aligned with case law and legal writing.

More specifically, the research method is predominantly focused on answering the research questions by studying the most authoritative source. In the context of the undertaking concept that source is the EU Courts and, in particular, the CJEU. In adding perspective and analyses to the research of the undertaking concept I also discuss various aspects presented in legal writing to be contrasted with case law. With regard to the PSI area of EU law, the most authoritative sources are, in my opinion, the PSI Directives themselves. Consequently, when discussing the scope of access and re-use of documents held by public sector bodies I scrutinise and interpret the Directives literally with a teleological view.

In concluding on the intersection between competition law and the PSI Directives I conduct a case study of the case Compass. The purpose of the case study is to present my conclusions in a pragmatic vein and to apply them to an authentic case and, where applicable, to emphasise where the CJEU deviates from its reasoning in previous case law regarding the dichotomy between the undertaking concept and essential functions of the State.

To conclude this section, the Thesis will present both current legal statuses – de lege lata – and what the law should be – de lege ferenda. The

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12 Neergard, Nielsen and Roseberry, 81.
13 Alison Jones and Brenda Sufrin, EU Competition Law, Oxford: Oxford University Press, 2010, 4-18 and 42-54.
Thesis should be seen as a contribution to the discussion regarding the legitimate scope of EU competition law.

1.3.2 Material
With regard to legislation, I have looked at both primary and secondary EU law, which in my case are specific provisions in the PSI Directives and the Treaty on the Functioning of the European Union (“TFEU”). In the context of competition law, I have solely focused on Article 102 TFEU and case law connected to that provision. However, case law under Article 101 has also been analysed since it is equally relevant in terms of general statements regarding the concept of undertakings.

Regarding case law, the most authoritative source is the CJEU and is thus predominantly analysed throughout the Thesis. However, where I have found it interesting and relevant, case law from the General Court and national courts have been referred to as well. Also, in trying to draw conclusions from the judgements from the CJEU, Opinions of Advocate Generals are discussed. Although it would have been desirable to make a complete analysis of all case law relevant to the research questions, my analysis is based on a sample of judgements and Opinions of Advocate Generals that I have found to be of most relevance.

In addition to abovementioned sources, both legal writing and articles relating to the research questions have been studied.

1.4 Considerations and Delimitations
The questions of my Thesis are subject to, and in accordance with, certain delimitations and considerations. The current and future scope of access under the PSI Directive and the New PSI Directive respectively will only be scrutinised under specific provisions found in the Directives. More importantly, the question of whether a public sector body can be classified as an undertaking under EU competition law in a PSI setting naturally implies a fairly comprehensive discussion on the concept of an undertaking; determining if a given entity is an undertaking is the decisive first step in assessing anything under EU competition law. Therefore, a substantial part of this Thesis discusses and resolves around the undertaking concept, and, more
specifically, the dichotomy between essential functions of the State and economic activities. As a method of explaining the undertaking concept in a PSI setting, I have chosen to make a thorough and analytical case study of Compass\textsuperscript{15}. The case is illustrative regarding the undertaking concept in a PSI context and my purpose is that the case study will be helpful for both the reader and myself in the analyses. Due to the general character and importance for the applicability of EU competition law of the parts of the Thesis that deal with the undertaking concept, those parts can be of guidance in other competition law related aspects than just in a PSI setting.

Moreover, due to the narrow scope that a Thesis of 15 HE credits provides, the refusal to supply or licence doctrine will be discussed only to a limited extent. This is an area under the abuse of dominance provision Article 102 TFEU that has generated quite important case law and debate. Therefore, the possibility of this doctrine being applicable will only be touched upon. However, as a remainder, as the undertaking concept truly is crucial to the application of the refusal to supply doctrine, it will be dealt with thoroughly.

In addition, the Thesis explores the focus area on a EU level; current regimes on access to documents in Member States and domestic competition law legislation will therefore not be examined here. In line with the expected extent of this Thesis, I will not investigate whether the free movement rules could be applicable and helpful in gaining access to PSI, although this is an interesting question. Regarding the concept of an undertaking, case law that concern social security will only be dealt with to a limited extent. Those cases and the conditions for exemption from the application of the competition rules laid down are only relevant in terms of general statements regarding the undertaking concept. This is because cases that regard social security and insurance do not involve activities relevant in a PSI setting. On that note, the research undertaken will only focus on the nature of an undertaking and not on the boundaries of an undertaking. This means that questions regarding where one undertaking ends and another begins or if a subsidiary and its parent are one or two undertakings will be outside the scope of this Thesis.

Finally, since refusal to supply is a type of abuse of a dominant position, Article 102 TFEU will be the competition law provision mainly in focus.

Articles 101, 103-109 TFEU and the Merger Regulation will be outside the scope of the Thesis in this aspect. In respect of the PSI rules, only provisions relevant to re-use of documents will be dealt with, foremost Article 3 of both Directives and Recitals 9 of the PSI Directive and 7-8 of the New PSI Directive.

To keep any results of this research accessible to whoever might find it useful, e.g. other academics, public institutions and companies, I have chosen to write the Thesis in English.

1.5 Outline

In addressing my posed questions, the Thesis is divided into two parts. The first part is of a _de lege lata_ character. It elaborates the current scope of re-use under the PSI Directive. It also discusses if a public sector body could be an undertaking when re-using PSI and, as a consequence, possibly be obliged to allow private companies to re-use PSI under the refusal to supply and licence doctrines. This part entails extensive analyses of the undertaking concept and the Compass case. The second, and final, part addresses the issue from a _de lege ferenda_ perspective and looks at the New PSI Directive and how the scope of access to PSI will or, alternatively, should be constructed when it has entered into force.
PART I
2. **What is the current scope of re-use under the PSI Directive (2003/98/EC)?**

It is stated in recital 9 of the PSI Directive that “[t]his Directive does not contain an obligation to allow re-use of documents. The decision whether or not to allow re-use will remain with the Member States or the public sector body concerned.” It is clear that the PSI Directive builds on the current access regimes in Member States and does not change their legislation regarding access to public documents. Instead, the PSI Directive merely encourages public sector bodies to make available any documents held by them for re-use.

The focus of the PSI Directive is instead, which can be seen from the **General Principle** in Article 3, that Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, the documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions in the Directive. The conditions referred to are found in Chapter III and IV. Therein, principles regarding charging\(^{16}\), transparency\(^{17}\), exclusive arrangements\(^{18}\), licensing through non-discriminatory\(^{19}\) and non anti-competitive terms\(^{20}\) are found. It is thus clear that the PSI Directive relies on established competition law principles to govern the situation after access to PSI has been granted and re-use has been allowed. The following will discuss the situation that the PSI Directive does not regulate in its provisions – the re-use question.

### 2.1 A possibility of re-use when the public sector body itself has started to re-use its PSI?

According to Article 2(5) of the PSI Directive ‘re-use’ is defined as 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. In addition, exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use. Arguably, it is possible that, under certain

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\(^{16}\) Article 6.  
\(^{17}\) Article 7.  
\(^{18}\) Article 11.  
\(^{19}\) Article 10.  
\(^{20}\) Article 8.
circumstances, a public sector body could itself re-use its documents and, as a consequence, be obliged to allow re-use to others as well. The logic consequently is that, once a public sector body has started to re-use documents outside the scope of its public task; it should under the PSI Directive allow re-use to all others requesting it. I base this on the fact that recital 9 of the PSI Directive does not solely state that the Directive does not contain an obligation to authorise re-use. It also states that the Directive should apply to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information. Therefore, if a public sector body starts using documents generated in its public task outside the scope of that task, in line with the definition of re-use provided in Article 2(5) of the PSI Directive, it has made its documents accessible for re-use and the PSI Directive is applicable according to recital 9. For instance, a public sector body may start to exploit its documents through a commercial branch. In such a case, one should consider if the public sector body has started to re-use documents itself.21

My interpretation of the whole of recital 9 is thus that a State or a public sector body has a prerogative under the PSI Directive to re-use or not to re-use the PSI. Thus, when a decision has been made to re-use the PSI, the PSI Directive applies and the State or the public sector body should make the PSI re-usable to any requesting access in line with Articles 10 and 11.22

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21 See e.g. the case study on Case C-138/11, Compass-Datenbank v. Austria, [2012] 5 CMLR 13 below.
3. Under What Circumstances can a Public Sector Body be Classified as an Undertaking under EU Competition Law?

Since there is a gap in the PSI Directive regarding the possibility to re-use public documents, this Section scrutinises if a public sector body can be an undertaking in a PSI setting and, consequently, could risk abuse its dominant position by refusing to allow re-use of its PSI. The EU Courts have produced significant case law regarding the possibility of public bodies being undertakings and when dominant undertakings can infringe Article 102 TFEU by refusing to supply or licence. Therefore, it is relevant to discuss and scrutinise whether a private company wanting to re-use PSI can get such access solely by invoking EU competition law.

3.1 The Undertaking Concept

Advocate General Jacobs has noted that the concept of an ‘undertaking’ serves a dual purpose. The first is to determine the categories of actors to which the competition rules apply. This can cause difficulties regarding activities of States and public bodies. It is thus crucial to elaborate this purpose of the undertaking concept in order to answer the research questions of this Thesis. The second purpose is that it serves to establish the entity to which certain behaviour is attributable.23

The term **undertaking** has the same meaning for the purposes of both Articles 101 and 102 TFEU and acts as the trigger for the competition rules.24 The term is not defined in the Treaty but has been interpreted in cases by the European Courts. As a starting point, the case Höfner25 tells us that ‘[i]n the context of competition law … the concept of an undertaking, encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed’.26 Thus, entities engaged in

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24 Jones and Sufrin, 124. Many of the cases discussed throughout the Thesis concerned both Article 101 and Article 102.
26 Ibid, para. 21. The test has been reiterated and applied in many subsequent cases, see e.g. Cases C-309/99 *Wouters* [2002] ECR I-1577, (and the case law cited); C-189/02P, etc, *Dansk Rørindustri v.*
economic activity must respect the principles of competition. The critical question to delineate an undertaking must therefore be what constitutes economic activity? It is seen below that the notion of economic activity encompasses a wide range of activities. This poses a difficulty since activities that actually fall within the wording of the definition may not be suited to be governed by competition law. For example, the achievement of social aims or aims that are to the better good for a community as a whole could often be jeopardised if the entity responsible for achieving those aims would be subject to a competitive system. The same applies for an employee for whom the system of competition law is not adapted to be applicable.\textsuperscript{27} The difficulty thus lies within the broadness of the definition. The CJEU has tackled this problem by establishing first a general principle encompassing the circumstances under which an activity is considered to be economic and, second, by exempting certain activities from the scope of the general principle, e.g. the performance of tasks in the public interest. The circumstances for economic activity and the specific exemptions will be explored below.

Moreover, a functional approach is adopted to the concept of an undertaking. This means that it focuses on the nature of the activity carried on by the entity concerned; the concept is relative. Therefore, a given entity might be regarded as an undertaking for one part of its activities while the rest falls outside the competition rules.\textsuperscript{28}

A PSI setting implies activities that might be very close to the core activities of the public sector body.\textsuperscript{29} To find out if a certain part of a public sector body could be an undertaking when re-using PSI, the aim of the following is mainly to explore the constituent elements of economic activity and to find out which activities are taken out of the ambit of the undertaking.
concept (and thus outside the scope of the competition rules). In the latter sense, the following section will focus on activities that are considered ‘a task in the public interest which forms part of the essential functions of the State’ and, therefore, exempted. In line with the functional approach, I will also try to identify which part, or parts, of the public sector body that could be an undertaking when it is re-using PSI.

3.2 The Functional Approach

For the purpose of trying to identify which part, or parts, of a public sector body that could be an undertaking, it is relevant to give an account of the functional approach that is adopted to the undertaking concept. As mentioned above, it focuses on the nature of the activity being carried out by the entity concerned rather than its institutional status. It has been stated that the functional approach derives from the definition in Höfner. Moreover, the Court stated in MOTOE that ‘the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking … in respect of the remainder of its economic activities’. Thus, the essence of the functional approach is that the classification of an activity as either the exercise of public powers or as economic must be carried out separately for each activity exercised by a given entity. The functional approach, therefore, means the relevant question is not who is an undertaking but rather what is an economic activity? My interpretation is that this implies a conduct-for-conduct assessment when scrutinising a given entity’s activities.

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31 The term State imperium (or imperium) can also be used as a generic term for the group of activities usually referred to as a task in the public interest which forms part of the essential functions of the State, activities that are connected by their nature, their aim and the rules to which they are subject with the exercise of powers that are typically those of a public authority and when public bodies act in their capacity as public authorities. The term is also used in legal writing, see e.g. Victoria Louri, ‘Undertaking’ as a Jurisdictional Element for the Application of EC Competition Rules, Legal Issues of Economic Integration 29(2), 143 et seq and Okeoghene Odudu, Economic activity as a limit to Community law, Chapter 10 in Catherine Barnard and Odudu, The Outer Limits of European Union Law, Hart 2009, Oxford, 232 et seq.
33 Whish & Bailey, 84-85.
35 Ibid.
3.3 The Constituent Elements of Economic Activity

From the definition of an undertaking stipulated in Höfner and the functional approach it should be understood that there are no entities that cannot be undertakings, only activities that cannot be economic. When determining whether an entity is an undertaking, it is, consequently, necessary to first determine the relevant activity that is being carried on by the entity and after that consider if that activity is economic. This depends on the nature and the aim of the activities. In Höfner, the Court only provided a description of what an undertaking is; an entity engaged in economic activity. The Court held that employment procurement has not always been, and is not necessarily, carried out by public entities. Apart from that specific statement, it was not further elaborated what economic activity is. However, through subsequent case law the Court has set out some, presumably, constituent elements of economic activity.

Below, case law will be discussed in order to identify these elements of economic activity as jurisprudence stands today. The elements identified are, in short, the following: (i) the offering of goods or services on the market, (ii) an activity that could, at least in principle, be carried on by a private undertaking in order to make profits, (iii) the entity carrying on the activity must bear the economic or financial risk of the enterprise.

3.3.1 The Offering of Goods and Services on a Market

Legal writing and case law tells us that economic activity is an activity consisting in the offering of goods and services for remuneration on a given market. It started in Commission v. Italy where the Amministrazione Autonoma dei Monopoli di Stato (“AAMS”) manufactured and sold tobacco. However, under Italian law, the AAMS, as a public authority, was a part of the State. In line with Höfner the Court ignored the entity’s institutional status and

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found that AAMS was an undertaking since the offering of goods or services to the market was economic activity.\textsuperscript{40} Moreover, it was emphasised in \textit{FENIN}\textsuperscript{41} that the offering of goods and services on a given market is the characteristic feature of an economic activity. In that case it was held that purchasing activity, as such, is not economic activity and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.\textsuperscript{42}

The meanings of goods and services have been well developed within the area of free movement under Articles 28 and 56 TFEU respectively.\textsuperscript{43} These definitions have been recognised by the Court when deciding under competition law whether an entity is offering goods or services to the market.\textsuperscript{44}

\textbf{Some comments about on a market}

It is clear from the case law referred to above that this element is not formulated solely as the offering of goods or services. It is also stated that the goods or services must be offered on a market.\textsuperscript{45} Arguably, it is possible that an economically defined market on which the goods or services are offered is a second requisite criterion within this element. This can be seen from case law. In \textit{Ambulanz Glöckner} the medical aid organisations provided services, for remuneration from users, on the market for emergency transport services and patient transport services.\textsuperscript{46} Moreover, the self-employed economic operators in \textit{Pavlov} offered services on the market for specialist medical services.\textsuperscript{47}

Although the Court in most cases does not discuss this criterion in depth, it is, presumably, necessary to define the market on which the commodity is offered in an economically viable manner. This implies that the SSNIP test, demand and supply substitutability must be considered as is common ground

\textsuperscript{40} \textit{Case 118/85, Commission v. Italian Republic}, [1987] ECR 2599, para. 7.
\textsuperscript{41} \textit{Case C-205/03, P Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission}, [2006] ECR I-6295.
\textsuperscript{43} See Catherine Barnard, \textit{The Substantive Law of the EU} (Oxford University Press, 2010), 34 and 356 et seq.
\textsuperscript{44} Odudu, 27.
when scrutinising and determining a relevant market under EU competition law.\textsuperscript{48}

### 3.3.2 Potential to make Profit

Advocate General Jacobs stated in his Opinion in \textit{AOK} that the basic test of finding an economic activity is whether it ‘could, at least in principle, be carried on by a private undertaking in order to make profits’.\textsuperscript{49} The basis of this element from which it has been developed further, presumably, stems from the Court’s reasoning in \textit{Höfner} that economic activity ‘has not always been, and is not necessarily, carried out by public entities’.\textsuperscript{50} Thus, if there is no potential to make profit, no private entity could carry out the activity and it would be a necessity to have a public entity to carry on the activity. The passage cited from \textit{Höfner} implies that one also should make a historical assessment of whether the activity has/not always been carried out by public entities. While what has taken place historically certainly is helpful, my interpretation is that, if there is a present profit potential, which means that it is not necessary for a public entity to carry out the activity, what history tells us is immaterial. As Advocate General Jacobs stated in his Opinion, ‘If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it’.\textsuperscript{51} Consequently, if there were a possibility of a private undertaking carrying out an activity, there would be a purpose in applying competition rules to it.

In addition, the fact that an entity lacks a profit-motive or does not have an economic purpose does not, in itself, mean that the activity is not economic. Neither is it necessary to actually make profits.\textsuperscript{52} Seemingly, this element tells

\textsuperscript{48} See Jones \& Sufrin, 63-84 and the Commission’s Notice on the definition of the relevant market [1997] OJ C372/5.
\textsuperscript{50} Case C-41/90, \textit{Höfner and Elser v. Macroton GmbH}, [1991] ECR I-1979, para. 22. The Court makes the same reasoning in \textit{Ambulanz Glöckner} where it states that the services the medical aid organisations provided on the market for emergency transport was activities that have not always been, and are not necessarily, carried on by such organisations or by public authorities; Case C-475/99, \textit{Ambulanz Glöckner v. Landkreis Südwestpflaz}, [2001] ECR I-8089, para. 20.
us that the sole possibility to make profits is sufficient. Although actual profit-making is not part of the test of economic activity, the EU Courts have sometimes noted the non-profit making nature of an activity when finding that a given activity was not economic in nature.

3.3.3 The Bearing of Financial Risk

In Pavlov medical specialists, which were considered undertakings, provided services on a market and assumed the financial risks attached to the pursuit of their activity. Moreover, registered members of the Bar in the Netherlands did in Wouters carry on economic activity, inter alia, on the ground that they bore the financial risks attached to the performance of their activities. In Commission v. Italy, a case that concerned Italian customs agents, the question arose whether the activity that the customs agents performed was economic. Apart from that they offered services on the market, the Court held that since the customs agents assumed the financial risk involved in the exercise of the activity they were undertakings. The absence of financial risk bearing has also been used to explain why employees are not engaged in economic activity. In a similar vein, the Commission takes the stance that commercial agents that negotiate business transactions on behalf of a principal are not undertakings if they do not bear any financial or commercial risk.

In legal writing, neither Jones & Sufrin nor Whish & Bailey presents the bearing of financial risk as a constituent element of economic activity, however, Odudu does. Apparently, case law shows, in line with what Odudu

53 This element is apparent from Höfner itself where an assessment of the market for recruitment consultancy services in Germany showed that the state recruitment consultancy was unable to meet demand why there was a potential to make profits for a competing private entity.
58 Ibid, para. 37.
61 Jones and Sufrin, 124 et seq and Whish and Bailey, 82 et seq.
62 Odudu, 34 et seq.
proposes, that the bearing of financial risk is something that should be taken into account in the assessment of whether an economic activity is being carried out. This should, however, be contrasted with the important statement in Höfner that tells us that the way in which the entity is financed is immaterial, as long as it is carrying out economic activity.63 As seen, the Court has reiterated this statement on numerous occasions. This makes it unclear whether financial risk bearing is a constituent element of economic activity. The conclusion should therefore be that the element affects the assessment rather than being decisive.

3.4 Autonomy

The functional approach tells us that the legal status or the way in which an entity is financed is immaterial to the question of whether it is performing an economic activity; it is the activity in question that determines if the entity is an undertaking or not. However, case law and legal writing sometimes convey an additional approach to the concept of an undertaking meaning that the entity engaged in an economic activity at the same time must enjoy a certain degree of autonomy in order to constitute an undertaking under competition law.64 For example, employees do not constitute undertakings since they lack the necessary independence that is required to be qualified as one.65 To contrast this with the functional approach and the definition of economic activity, one could argue that since employees offer remunerated services they should be regarded as undertakings for the purposes of competition law. Nevertheless, the notion of autonomy has affected cases concerning employees where they were deemed part of their principal’s organisation instead of undertakings on their own right; they lacked a sufficient degree of independence. Similar to employees are agents that, on behalf of a principal, negotiate business transactions either in their own name or in the name of the principal. The relationship between the agent and the principal falls outside the scope of

65 See e.g. Cases C-40-48/73, 50/73, 54-56/73, 111/73, 113-114/73, Suiker Unie and Others v. Commission [1975] ECR 1663.
competition law because an agent is not considered an undertaking due to the lack of independence in the commercial decision-making.66

As has been stated above, an entity must offer goods or services on a market in order to carry on economic activity. On that note, it can be argued that an entity offering a commodity in a sense chooses to enter a market. The choice whether to enter a market and to start offer the commodity certainly implies that the entity has a degree of autonomy in its commercial decision-making.

Moreover, it is, presumably, possible to subsume the financial risk-bearing element under the autonomy notion. It is undoubtedly so that bearing a financial risk for an enterprise is connected to the level of autonomy the entity enjoys. However, as case law and legal writing present it, autonomy is a notion that affects the whole assessment of an undertaking rather than solely being an element of economic activity. The financial risk-bearing element is sometimes incorporated in this assessment and, other times, it could be argued that it is a constituent element of economic activity. Autonomy, however, entails several factors that usually relate to independency in making commercial decisions.

3.5 Concluding Comments

One could argue that the concept of an undertaking includes two criteria that are separate from each other. First, the entity must be engaged in economic activity on a given market and, second, the entity must enjoy a sufficient degree of autonomy in its commercial operations.

For there to be economic activity, two elements should be present. First, the activity must include the offering of goods or services on a market. Secondly, the activity must have the potential to be profit-making or, in other words, possibly be carried on by a private undertaking in order to make profits, at least in principle. In addition to this, it could be argued that the entity must bear the financial risk for the success of the activity as well. The significance of this is however uncertain. Solely based on case law I would not rely on it as a criterion that has to be fulfilled but rather a factor that affects the assessment of economic activity. In line with Höfner, an entity could distort competition on a market regardless if it bears the financial risk of the enterprise. However,

to not consider the financial risk, or the absence of it, means that the definition of economic activity could encompass almost all public activities as long as private actors can offer the same good or service on a market. As seen below, the Court seems to have realised this broad definition when delimiting activities that are attributable to the State. In those cases the Court formulate itself as if activities, which are not those of undertakings, constitutes exemptions on a case-by-case basis rather than stand-alone definitions. Seemingly, case law has established a main rule derived from Höfner, which encompasses almost all activities, and activities that are attributable to the State will be exempted. When delineating economic activity the financial risk-bearing element proves important to establish the line between activities that are not economic and those that are State imperium or, i.e., ‘a task in the public interest which forms part of the essential functions of the State’.

3.6 Member States and the Essential Functions of the State

In classifying a public body as an undertaking, the test is the same as for other entities, namely whether the body is engaged in economic activity. There is however a dilemma in assessing activities of pubic bodies and it has been summed up as follows:

‘In seeking to determine whether an activity carried on by the State or a State entity is of an economic nature, the Court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the [internal] market and respect the powers of the Member States. The power of the State which is exercised in the political sphere is subject to democratic control. A different type of control is imposed on economic operators acting on a market: their conduct is governed by competition law. But there is no justification, when the State is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules in such cases.’

68 Case C-205/03, P Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission, 2006 ECR I-6295, Opinion of Advocate General Maduro, para 26. The Opinion refers to useful case law on this topic.
The fact that there is no justification for the State, as an economic operator, for relieving its actions of all control but rather that it must observe the competition rules is the starting-point for this section.

The application of the antitrust rules (Articles 101 and 102 TFEU) to public bodies acting on the market is justified by the fact that when a public body performs economic activity, it is subject to the same or similar conditions on the market and operates under similar principles as private entities that are subject to the competition rules.\(^6^9\) In considering the distinction between economic activities and those of the State, the CJEU has contrasted economic activity with the performance of ‘a task in the public interest which forms part of the essential functions of the State’.\(^7^0\) Thus, States or public bodies are not undertakings when they act in the performance of their sovereign public functions.

3.6.1. Distinction Between Economic Activity and State Functions

It follows from the outset above that the critical issue in determining whether an entity is engaged in an activity of economic nature or a task in the public interest is the definition of **economic activity**. Also, the **functional approach** is crucial here, i.e. a State body can be an undertaking in respect of some of its activities and not in respect of others; each activity carried on by the State or public bodies must therefore be analysed separately in a conduct-for-conduct manner.\(^7^1\)

If the offering of goods or services to the market, at least in principle, could be carried on by a private entity in order to make profits there should be an economic activity and the entity carrying it on should be an undertaking, and, by contrast, ‘[i]f there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the

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\(^{70}\) Case C-343/95, *Diego Cali & Figli Srl v. Servizi Ecologici Porto di Genova Spa*, [1997] ECR I-1547, para. 22. See also COMP/38469 *Athens International Airport*, decn of 2 May 2005, para. 49 (passenger security checks on behalf of the Greek State was not the exercise of economic activity).

competition rules to it’. If tasks in the public interest would be subject to a competitive system it is likely that the effectiveness of the tasks would be jeopardised. The EU Courts struggle with a quandary here. They must find a balance between the need to protect undistorted competition and the need to respect the powers of the individual Member States. The extensive definition of economic activity presented above seems to derive from the Courts’ willingness to protect undistorted competition. It proves nonetheless reasonable to apply a wide definition to the undertaking concept since organs vested with public powers can offer goods and services to the market just like any other private actor. In such cases there is no reason to exclude those organs from the rules of competition, particularly because it would open up for public organs to circumvent the Treaty by distorting competition on the market legally. However, when public entities perform tasks in the public interest, they are excluded from competition law. The important question is therefore, what constitutes a task in the public interest that forms part of the essential functions of the State?

3.6.2 Cases Eurocontrol, Diego Cali and Bodson

It follows from case law that one main criterion decides when an entity is acting in the capacity as public authority. The activity must form part of the essential functions of the State, i.e. be connected by its nature, its aims and the rules to which it is subject with the exercise of powers which are typically those of a public authority.

In Eurocontrol the European air traffic control organisation performed tasks that were in the public interest (exercise of powers relating to the control and supervision of air space through an international Convention). The CJEU held that the organisation was not an undertaking even though route charges

73 Bastidas, 60.
74 The formulation ‘act in their capacity as public authorities’ can be found in Case 30/87, Corinne Bodson v. Pompes Funèbres de Régions Libérées SA, [1988] ECR 2479, para. 18.
were collected. The supervision of airspace was a **task in the public interest** aimed at contributing to air navigation safety and it was held that the Contracting States had exclusive sovereignty over their airspace. Such tasks were, according the Court, typically those of public authorities and, therefore, not of an economic nature. The Court also noted that Eurocontrol was not able to decide the fees for the service it provided on its own.

Moreover, in **Diego Cali**79, a public body had granted an exclusive concession to the private company SEPG, which, under the concession, conducted anti-pollution surveillance in Genoa harbour. Cali refused to pay the fee connected to the surveillance services invoiced by SEPG arguing that it never requested nor had the need for such services during its operations in the harbour. The CJEU noted the balance between situations where the State acts in exercise of official authority and where it carries on economic activities.80 Recognising that, the Court stated that such surveillance were connected by its nature, its aim and the rules to which it was subject with the exercise of powers relating to the protection of the environment, which are typically those of the State. It also stated that the activity, as such, was a task in the public interest that forms part of the essential functions of the State.81 Regarding the fee, the Court noted that it was connected to the activity in question, which had the purpose of environmental protection. It also found that the amount had to be approved by a public authority.

**Eurocontrol** and **Diego Cali** shows the CJEU’s assessment that these tasks, in contrast to those carried out in Höfner, could only be performed by or on behalf of a public body. It is likely that the subject matter that made the outcome of these cases, compared to where the Court came to the opposite conclusion,82 is the fact that in **Eurocontrol** and **Diego Cali** the entity was protecting a public interest; air navigation safety and the environment. This was also emphasised by Advocate General Cosmas in **Diego Cali** where he

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77 Ibid, para. 30.
78 Ibid, paras 23 and 29.
80 Ibid, para. 16.
81 Ibid, paras. 22-23.
noted that ‘the maritime zone of the Porto Petroli, that is to say a public asset, is being protected in the interest of the State and of citizens’. Regarding payment of services in the public interest, it was recognised by Advocate General Tesauro in *Eurocontrol* that the service provider could only be assured payment by state compulsion. He stated that Eurocontrol’s charges ‘undoubtedly constitute a tax burden, since they are a sort of financial contribution to the costs incurred by the States, payable by the individual for the benefits he has received’. In addition to that, the tasks assigned to SEPG in *Diego Cali* should be recognised as non-excludable, meaning the surveillance needed to be conducted regardless of whether the fees owed by a particular user had been paid.

A case that did not concern such essential matters of the State as is *Bodson*. In fact, the case concerned a French law that entrusted the performance of funeral services to local communes; several communes in turn granted concessions to provide those services to private undertakings. The CJEU simply held that Article [101 TFEU] did not apply to ‘contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the provision of a public service’ (emphasis added).

### 3.6.4 Other Relevant Factors

The distinction where the State conducts economic activity and where it acts in the exercise of public powers is not always evident. The fact that a public entity in carrying on economic activity operates under public service obligations imposed by the State may place it at a competitive disadvantage but does not affect the economic character of the activity. Further, a body performing quasi-governmental functions is an undertaking in respect of its

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87 Ibid, para. 18.

own commercial agreements.\textsuperscript{89} Also, the fact that a charge is made for the provision of a service does not automatically mean that the activity is economic.\textsuperscript{90} On the contrary, that a service is provided for free is also not determinative.\textsuperscript{91}

### 3.7 Concluding Comments

After studying case law it is not clear if the Court relies on the functional approach when determining if a certain activity is attributable to the State. It focuses on the specific activity under scrutiny but does it solely look at the activity? It is nonetheless clear that the Court uses certain formulations when deciding an entity is not conducting economic activities. An entity acts in the exercise of official authority where the activity in question is (i) a task in the public interest which forms part of the essential functions of the State and (ii) where that activity is connected by its nature, its aim and the rules to which it is subject with the exercise of powers that are typically those of a public authority. However, these formulations are unique in each case, which points toward that an overall assessment should be conducted on a case-by-case basis. There seem to be no ‘thumb rules’ to delineate activities attributable to the State as there are for economic activities. Nevertheless, some factors have proved to be helpful, but not decisive, in the difficult exercise of making the assessment of State imperium on a case-by-case basis. The Court relies on the nature and the purpose of the activity in question,\textsuperscript{92} if the entity is autonomous,\textsuperscript{93} how the entity and its activity are financed,\textsuperscript{94} the setting of prices and the conditions for providing the service\textsuperscript{95} (e.g. compulsory payment). Arguably, the factors deviate from Höfner and the functional

\textsuperscript{89} See e.g. Cases 258/78, Nungesser v. Commission, [1982] ECR 2015, (INRA, the French national institute of agricultural research were deemed an undertaking); T-128/98, Aéroports de Paris v. Commission, [2000] ECR II-3929 (airport authority in respect of its contracts for groundhandling services).


\textsuperscript{91} See Section 3.3.2.


\textsuperscript{93} In Eurocontrol the entity’s operations were constrained according to provisions in the convention between the States concerned.


approach in that the Court looks at how the entity and its activity is financed and whether it is autonomous. The fact that the entities in Eurocontrol and Diego Calì were protecting essential functions of the State seem to supersede the definition in Höfner and maybe the Court used these factors to support its opinion that the rules of competition should not be applicable in cases that concern essential functions of the State. However, to take how the entity is financed and its autonomy into account does not fit well into the functional approach that now undoubtedly is adopted to the undertaking concept. The assessment would then entail issues such as the decision-making process of the entity instead of solely looking at the activity as such, which is the proper application of the functional approach. Therefore, I would only rely on the fact the entities were performing tasks in the public interest that formed part of the essential functions of the State and conclude that that assessment is to be made on a case-by-case basis. It remains to be seen whether the Court will distinctly step away from the functional approach in cases that concern State imperium or if it will continue to look at other factors before coming to the conclusion that the activity, as such, forms part of the essential functions of the State.

Concerning the Bodson case, in my opinion, it was not clearly connected to the essential functions of the State. The Court simply stated that the communes were acting in their capacity as public authorities when they granted the concessions. The Court did not assess the nature of the activity. The concession, in itself, exempted the communes from the competition rules and it seems odd that a Member State can circumvent the competition rules by simply granting concessions. Conversely, other cases such as Commission v. Italian Republic and Höfner point toward that the communes in Bodson actually were carrying on economic activity; they offered a service on the market with the potential to make profits. Also, there was a possibility for a private undertaking to carry out the activity why there was a purpose in applying competition rules.


4. THE UNDERTAKING CONCEPT IN A PSI SETTING

A PSI setting can include a number of different scenarios. Similar for all such cases are however a public sector body that generates PSI when it is carrying on a public task assigned to it by the State. The character of the subsequent use of the PSI is then determinative if the undertaking concept could be relevant. The purpose of the figure below is to provide the reader with a simple overview of how a PSI setting could look like. The box that the undertaking concept is tried against is the commercial branch/activity where wholesale of the PSI is carried on under public control. The boxes below it, private company and industry and commerce are private ‘enterprises’ wanting (i) to re-use the PSI in competition with the public sector body on the wholesale level, or (ii) to re-use the PSI in making value-added products supplying them to the market from the retail level. Crucial for those two is that they must be authorised to re-use the PSI that the commercial branch are dominant over. If that commercial branch could be an undertaking, the two other boxes could utilise EU competition law to re-use the PSI through the refusal to supply or license doctrines. In the Compass case discussed below, Compass-Datenbank is a company active in the box industry and commerce.
4.1 The Compass Case

In the context of a PSI setting, the Compass case is interesting. Under the specific circumstances of the case, it deals with, inter alia, the undertaking concept and the refusal of public authorities to authorise re-use of PSI. By providing the background of the case along with the reasoning of Advocate General Jääskinen and the CJEU, I pragmatically explain and explore the undertaking concept in a PSI setting. I will then draw conclusions from the case and show aspects of the Court’s and the AG’s analyses which can be questioned.

4.1.1 Background

Compass-Datenbank (‘Compass’), a company established under Austrian law, operated a database containing economic data for the purpose of providing information services. In order to provide its services, Compass required access to daily updates of raw data on a continuous basis from the ‘Firmenbuch’ (the Austrian companies register) concerning entries and/or deletion of information by undertakings, which they were granted until 2001. The information services that Compass provided were thus based on information in the Firmenbuch, supplemented by other information from other sources, such as information from Chambers of Commerce, to add value to this information in the form of a product to its customers.  

Under an Austrian law, the Firmenbuchgesetz (‘FBG’), businesses were required to disclose certain information to be put in the register. Under that law, such information was also to be made available to the public. The Republik Österreich (the ‘Austrian State’), which maintained the Firmenbuch, conferred in 1999, in the course of a procurement procedure, upon a number of undertakings the setting up of billing agencies for transmitting – in return for payment – the data in the Firmenbuch (‘the billing agencies’). These agencies, during the relevant time, were selected on qualitative criteria and any undertaking fulfilling the required service and performance qualities could be accepted as a billing agency. The billing agencies established an online connection between the final customer and the Firmenbuch database for

which they charged fees they then passed on to the Austrian State. The billing agencies were allowed to charge a reasonable supplementary amount for their own operations. Moreover, the billing agencies and the final customers were prohibited, through Austria’s sui generis intellectual property right to the database, from (i) making their own data collections that reproduce the data in the Firmenbuch, (ii) from supplying that data themselves or (iii) from adding advertising to the content or presentation of that data (i.e. prohibition of re-use). In this course, the Austrian State brought in 2001 an action before Austrian Courts seeking to prevent Compass from re-using the Firmenbuch data. After being prevented from re-using the information, Compass, in 2006, brought an action against the Austrian State seeking to oblige the State to make available to Compass, in return for adequate payment, certain documents from the Firmenbuch. After dismissal of that action, Compass appealed to the Austrian Supreme Court. The Supreme Court found it possible to consider that Compass could rely on competition law, and, therefore, referred the case back to the Regional Civil Court in Vienna to request Compass to indicate whether it based its claims on rights derived from the IWG (the Austrian law implementing the PSI Directive) or those derived from competition law. Compass stated that its claims were based on competition law provisions, applying, by analogy, the IWG rules on remuneration. After the case had been referred to the Higher Regional Court in Vienna, which had jurisdiction in competition matters, it was yet again appealed to the Supreme Court. By its appeal, Compass requested, in essence, that the Austrian State should make available up-to-date documents from the Firmenbuch in return for reasonable remuneration. Compass’s request was based on the argument that the Austrian State as a dominant undertaking within the meaning of Article 102 TFEU, was obliged to provide the data from the Firmenbuch, applying the essential facilities doctrine. The Supreme Court decided to stay the proceedings and refer, inter alia, the following question to the CJEU for a preliminary ruling:

Is Article 102 TFEU to be interpreted as meaning that a public authority acts as an undertaking if it stores in a database (Firmenbuch – companies register) the information reported by undertakings on the basis of statutory reporting obligations and allows inspection and/or print-outs to be made in return for payment, but prohibits any more extensive use?

If the reply to Question 1 is in the negative:
Does a public authority act as an undertaking in the case where, in reliance on its sui generis right to protection as the maker of a database, it prohibits uses which go beyond that of allowing inspection and the creation of print-outs?

4.1.2 Opinion of Advocate General Jääskinen

Advocate General Jääskinen started by analysing the role of the billing agencies. This was important because, in determining whether a public authority acts as an undertaking, an analysis is required of the individual activities of the public authority concerned; thus the activities of the Austrian State, rather than those of the billing agencies were relevant in determining the applicability of Article 102 TFEU. The distinction between the State and the billing agencies were also relevant since it is necessary to identify the market on which an undertaking is dominant as a starting point for an analysis under the refusal to supply doctrine; the AG’s analysis was therefore directed at the Austrian State rather than the billing agencies. With that context in mind, AG Jääskinen came to the conclusion that Austria was issuing concessions to the billing agencies. This was because the billing agencies had a certain limited freedom to set the price for the online access to the Firmenbuch provided by them, the remuneration received from third parties and from the contracting authority. The commercial risk relating to the online access to the Firmenbuch was born by the billing agencies, which also suggested that Austria only granted the agencies a concession. Moreover, it was held that the issue of whether the billing agencies carried on economic activity was irrelevant in relation to the question if Austria had acted abusively by refusing to allow re-

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102 Ibid, paras. 29-30.
use of the Firmenbuch. This was since the billing agencies were active on a separate and unrelated market to the market Compass wished to trade, namely the agencies were active on the market for online access to the Firmenbuch. Compass was not precluded from this market but had access to it on non-discriminatory terms, i.e. the same terms as the billing agencies. The type of access Compass requested was instead directly from the Austrian State and Compass claimed that the abuse thus were related to the prevention of the emergence, or continuation, of the market for the commercialisation of the Firmenbuch data (i.e. the prevention of subsequent re-use).

Secondly, AG Jääskinen noted the hierarchy of norms within EU legislature. It was stated that, although the EU Treaties beyond doubt prevails in the event of a direct conflict with a directive, the Directives 68/151, 96/9 and 2003/98 (the PSI Directive) formed an important part of the assessment of Austria’s activities. In line with this, it was noted that the test to determine whether a public body is engaged in economic activity entails consideration of their nature, aim and rules to which they are subject. By referring to **SELEX**\(^\text{104}\), the AG stated that such rules include any relevant directives.

Finally, AG Jääskinen pointed out three specific activities which the Court were required to consider in the context of whether the Austrian State acted as an undertaking in the present case. Those activities were:

(i) storing in a database (the Firmenbuch) information provided by businesses on the basis of statutory reporting obligations;

(ii) allowing inspection and/or printouts to be made of the Firmenbuch in return for payment; and

(iii) prohibiting re-use of the information contained in the undertakings register.

Regarding the storing of information in the Firmenbuch, the AG stated that it was beyond doubt an activity that was, by its nature, aim and rules to which it was subject, connected to the exercise of public powers. Further, the storage of

\(^{103}\) Case C-138/11, **Compass-Datenbank v. Austria**, [2012] 5 CMLR 13, Opinion of Advocate General Jääskinen, paras. 36-39.

data on the basis of a legal obligation (the ‘FBG’) was, according to the AG, an activity undertaken in the general interest of legal certainty. It was also stated that the Austrian State could impose administrative sanctions for undertakings following the obligation to disclose the information covered by the FBG. This was a relevant observation since the vesting of rights and powers that derogate from ordinary law is an established indicator of the exercise of public powers. In connection to this, it was also relevant that this activity was directly linked to Austria’s obligations to maintain such a register under Directive 68/151. The purpose of the register, to create a source of information that could be relied on in legal relations was, according to the AG, not something that could be carried through by private companies.

Another activity of the Austrian State was to allow inspections and printouts of the Firmenbuch. AG Jääskinen stated that public registers, such as the Firmenbuch, could not fulfil their essential purpose to create legal certainty through transparent availability of legally reliable information unless access to them is provided to the public. In respect of the fee charged for inspection, the AG noted that it did not lead to the conclusion that the activity was economic since it is commonplace for non-economic activities to have attached to them a service fee. Further, it was held that, even if allowing inspections and printouts were considered to be economic activity, those activities would be inseparable from the public activity of collecting the data.

AG Jääskinen then moved on to assess the prohibition of re-use of the information. The AG did not analyse whether this activity was economic in nature. It was merely stated that case law does not compel Member States to release data to economic operators, or otherwise facilitate the creation of new markets, in the absence of internal market measures that are designed to open up competition in industries that traditionally were State monopolies (as occurred in the telecommunications sector). Also, the AG noted that the maker of a database has the right, under EU law, to decide if and on what conditions

105 In this context, AG Jääskinen referred to Eurocontrol, para. 24.
107 Ibid, paras. 51-56.
access should be granted and that the PSI Directive does not contain an obligation on Member States to allow re-use of documents.\textsuperscript{108}

4.1.3 Reasoning of the Court

The Court first reiterated that an undertaking was any entity engaged in an economic activity, irrespective of its legal status and the way in which it was financed. The Court held that any activity consisting in the offering of goods or services on a market was an economic activity. Thus, the State itself or a State entity might act as an undertaking. By contrast, activities that fell within the exercise of public powers were not of an economic nature justifying the application of the competition rules in the TFEU. In addition, an entity, public or private, might be regarded as an undertaking in relation to only part of its activities if those activities are classified as economic activities (the functional approach). The Court referred to \textbf{SELEX}\textsuperscript{109} and stated that a public entity that carries on economic activity that can be separated from the exercise of its public powers, in relation to that activity, acts as an undertaking. Conversely, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers. Referring to \textbf{Eurocontrol}\textsuperscript{110} and \textbf{Diego Cali}\textsuperscript{111} the Court further stated that the fact that a service is provided in return for remuneration laid down in law and not determined by the entity is not sufficient for the activity in question being economic in character. In light of the entirety of that case law, the Court then assessed the activities of the Austrian State.

First, it analysed the data collection activity. It stated that the collection of data from undertakings that are under a statutory obligation to disclose the data subject to the powers of enforcement of the State is exercise of public powers.\textsuperscript{112} Secondly, the Court scrutinised the activity connected with the collection of data, namely the maintenance and making available to the public

\textsuperscript{112} Case C-138/11, Compass-Datenbank v. Austria, [2012] 5 CMLR 13, para. 40.
of the data collected. It held that that activity could not be separated from the activity of collecting the data and that it would be useless to collect data if not subsequently maintaining a database which stores the data for the purpose of consultation by the public.\textsuperscript{113} Regarding that the making available to interested persons of the data was remunerated, the Court noted, referring to SELEX, Eurocontrol and Diego Cali, that the fact that the fees due for the making available to the public were not determined directly or indirectly by the entity but were provided by law. Therefore, the charging, as such, could be regarded as inseparable from the activity of making the data available. The charging by the Austrian State did not change the legal status of the making available of the information, meaning that it neither constituted an economic activity.\textsuperscript{114}

Regarding the billing agencies, the Court reminded that it was the Austrian State that maintained the Firmenbuch and the database derived from it and that the billing agencies only established the connection between the final customer and the Firmenbuch database and collected the fees laid down by law. Apart from the sum they transferred to the Austrian State, the billing agencies were allowed, as remuneration for their activities, to charge the final customers with a supplement of a reasonable amount. Referring to paragraph 29 in Advocate General Jääskinen’s Opinion the Court stated that the activities of the Austrian State must not be confused with those of the billing agencies; it was the activities of the Austrian State and not those of the billing agencies that were under scrutiny in the case.\textsuperscript{115}

4.2 Comments on the Case

There are quite a few issues in the Compass case which I will try to analyse in order and according to, in my view, what would have been a sound approach to the Austrian State’s activities from a competition law perspective. I will support my arguments with previous case law that have been construed according to this view. The issues concerned, which I have found to be lacking in analyses or even missing analyses, are the following:

\textsuperscript{113} Case C-138/11, Compass-Datenbank v. Austria, [2012] 5 CMLR 13, para. 41.
\textsuperscript{114} Ibid, para. 42.
\textsuperscript{115} Ibid, paras. 43-44.
(i) failure to find the economic activity in transferring data to the billing agencies;

(ii) not applying the methodology developed in previous case law in defining, and finding, ‘economic activity’.

First, as an overall observation of the judgement, the CJEU is not supporting its arguments on the basis of a logical competition law rationale. In referring to quite a lot of case law on the subject of the undertaking concept and when a State engages in economic activity, the Court does not further elaborate the significance of that case law in the context of the case at hand. For example, after reference was made to cases such as Höfner, Diego Calì, Ambulanz Glöckner, FENIN, SELEX and Eurocontrol, it was simply held, with regard to the activity of collecting the data to the Firmenbuch, that in “the light of the entirety of that case-law, it must be observed that a data collection activity in relation to undertakings, on the basis of a statutory obligation on those undertakings to disclose the data and powers of enforcement related thereto, falls within the exercise of public powers. As a result, such an activity is not an economic activity”. Since this statement, seemingly, was the basis for putting all other subsequent activities within the ambit of the collecting activity (i.e. connecting those activities with the exercise of public powers), a more elaborate analysis would have been desirable. Moreover, the Court enters into a circular reasoning that somewhat adds on to my view. For instance, when it appraises whether the fact that the public body obtained revenues makes any difference in the analysis, it was held that “[t]he fact that the making available of data from a database is remunerated does not have any bearing on whether a prohibition on re-use of such data is or is not economic … provided that that remuneration is not itself of such a nature as to enable the activity concerned to be classified as economic” (emphasis added). Here the CJEU left the reader with a loose end; at which point would remuneration for services, or goods, change their classification of non-economic to economic? With these examples I move on to the specific issues mentioned above.

117 Ibid, para. 49.
Failure to find the economic activity in transferring data to the billing agencies

Both AG Jääskinen and the Court considered three activities of the Austrian State, namely (i) the data collection activity, (ii) the activity of maintaining and making the database available to the public, and (iii) the prohibiting of the billing agencies and third parties from re-using the information in the database.

I am of the opinion that there was another activity that the AG and the CJEU failed to recognise: the activity of transferring data to the billing agencies. This activity started in 1999 when the Austrian State decided to disseminate the information in the Firmenbuch to the billing agencies. As a consequence, the Austrian State created a market and put its product out on that market subject to competition between the billing agencies. Indeed I agree with the Court and the AG that the three activities they brought up was relevant to consider, but the dissemination of the data in the Firmenbuch to the billing agencies is another relevant activity which most likely could have been economic.

I will now apply the constituent elements of economic activity displayed above to see if the Austrian State was carrying on such activity in disseminating its PSI to the billing agencies. After that follows a discussion on if the Austrian State could have been exempted from conducting economic activity by carrying on an activity that formed part of the essential functions of the State. However, I will first comment the case in relation to the functional approach adopted to the undertaking concept.

The functional approach

The Court stated in MOTOE that ‘the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking … in respect of the remainder of its

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economic activities’. As was concluded above, this implies a conduct-for-conduct assessment. It would have been desirable to see the Court analysing each activity/conduct of the Austrian State separately and apply the elements of economic activity to them instead of deeming all subsequent conduct non-separable from the activity of collecting the data to the Firmenbuch. If the functional approach had been applied properly and methodically, the activity of transferring data to the billing agencies would have been identified more easily.

**Constituent elements of economic activity**

First, economic activity consists of the offering of goods or services to the market. To me, it is clear that by the procurement procedure and the continuous dissemination of the database to the billing agencies, the Austrian State offered a service in granting the billing agencies connection to the Firmenbuch and also, seemingly, offered a good in the information as such. The information and the continuous connection to the database was a bundled input that could be commercialised; the billing agencies could, as a consequence, act on a market and offer the input which they received from the Austrian State in competition with each other. The Austrian State thus sold an asset.

Secondly, as Advocate General Jacobs stated in his Opinion in *AOK*, the basic test of finding an economic activity is whether it ‘could, at least in principle, be carried on by a private undertaking in order to make profits’. The billing agencies surely made profits out of the service they offered to third parties; how could they otherwise survive on the competitive market they acted on? It is almost self-evident that opening up the Firmenbuch for online 24-hour access to search the database through the Internet was the offering of a service that had the potential to make profits. Save for the fact that it was the billing...

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122 See Section 3.2.
agencies that in fact provided the technological means for establishing the connection between the Firmenbuch and the final customers, it was the Austrian State that provided the source from which profits derived. In addition, and as previously mentioned, the fact that Austria did in fact not make profits out of the Firmenbuch data is not relevant. The lack of a profit-motive or an economic purpose does not, in itself, mean that the activity is not economic. Neither is it necessary to actually make profits; the sole possibility to make profits is sufficient. 125

**Essential functions of the State**

After the Court had established that collecting the data to the Firmenbuch was not economic activity, it was held that maintaining the database and making it available to the public equally was not economic activity in that it could not be separated from the activity of collecting the data. 126 The activity, which might have been economic in nature, of disseminating the data from the Firmenbuch to the billing agencies is a step further than just making the data available to the public. In Compass, the Court was solely focused with the fact that the Austrian State had a legal obligation to make the data available to the public. 127 Moreover, both the CJEU and AG Jääskinen held that public registers such as the Firmenbuch would be useless 128 and cannot fulfil their essential purpose unless access to the is provided to everybody 129. To this I agree. It would indeed be useless to create a database which essential purpose is to create legal certainty in business life through transparent availability of legally reliable information. Therefore, to make the information available to the public is within the exercise of public powers. However, when it was decided to open up the Firmenbuch to the billing agencies, the Austrian State took the obligation to make the database available to the public a step further; it put it out on and, presumably, created a market on which the billing agencies would not be active.

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125 See e.g. Joined Cases 209 to 215 and 218/78, Van Landeveyck v. Commission, [1980] ECR 3125, para. 88; Case C-244/94, Fédération Française des Sociétés d’Assurance, [1995] ECR I-4013, para. 21; Case C-67/96, Albany International BV, [1999] ECR I-5751, para. 85. This element is apparent from Höfner itself where an assessment of the market for recruitment consultancy services in Germany showed that the state recruitment consultancy was unable to meet demand why there was a potential to make profits for a competing private entity.


127 Ibid, paras 40-42.

128 Ibid, paras. 41.

without the connection to the Firmenbuch. In addition, and as AG Jääskinen stated, it was still possible to consult the register through local and regional courts or notaries for a statutory fee.\textsuperscript{130} In disseminating the database for remuneration by giving 24-hour access to search the database online through the Internet was neither part of the State’s legal obligation, nor a display of public power inseparable from collecting the data. By doing this, the Austrian State commercialised the Firmenbuch. In my opinion, the Austrian State, in this sense, reserved for itself a secondary market to which Compass wanted access.\textsuperscript{131}

The CJEU thus allowed the Austrian State to circumvent the competition rules by failing to scrutinise this activity. Hereby, development of a product for which there was a consumer demand was hindered to the prejudice of Austrian consumers. It is indeed a pity that the Court failed to see this activity since it was a promising opportunity to open up for a more liberal view toward the development of a PSI industry in the EU.

\textbf{(ii) Not considering the PSI Directive and the subsequent re-use of the collected data}

Regarding the applicability of the PSI Directive, the CJEU stated that, according to recital 9 in its preamble, the Directive does not contain an obligation to authorise re-use of documents. In addition, access to the Firmenbuch data was not covered by the IWG, the law by which the Austrian State transposed the PSI Directive. Moreover, according to the Court, it followed that the PSI Directive was irrelevant for the purposes of determining whether the refusal to authorise re-use of data in the case was or was not economic in nature.\textsuperscript{132} To the latter statement I agree. The PSI Directive does not affect the assessment of whether a given activity is economic; it is a stand-alone assessment under competition law. However, the Court could have found more inspiration in the PSI Directive than recital 9.

In my opinion the Court should have considered, under the PSI Directive, whether the Austrian State in fact itself re-used the data. According to Article

\textsuperscript{130} Ibid, para. 12.
\textsuperscript{131} See Case C-418/01, IMS Health v. NDC Health, [2004] ECR I-5039 where it was stated in para. 44 that it is sufficient to establish a hypothetical secondary market. In Compass, the Austrian State would have been dominant on such a market.
\textsuperscript{132} Case C-138/11, Compass-Datenbank v. Austria, [2012] 5 CMLR 13, para. 50.
2(5) of the PSI Directive ‘re-use’ is defined as 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. Also, exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use. The activity, which I believe is economic, of disseminating the Firmenbuch data to the billing agencies could as well be considered re-use under the definition provided in Article 2(5). The initial purpose within the public task in this case would have been to collect and store the data and making it available to the public. However, and as I have presented above, I think the Austrian State took the “making available” to the public a step further by using it as an input in business on a downstream competitive market. It is likely that this could be considered re-use.

Recital 9 does not solely state that the PSI Directive does not contain any obligation to authorise re-use. It also states that it should apply to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information. My interpretation of the whole of recital 9 is that a State or a public sector body has a prerogative under the PSI Directive to re-use or not to re-use the PSI. Thus, when a decision has been made to re-use the PSI, the PSI Directive applies and the State or the public sector body should make the PSI re-usable to any requesting access in line with Articles 10 and 11.133

It would have been interesting to see the Court’s assessment on if the Austrian State in fact were re-using the PSI when it disseminated it to the billing agencies. In my opinion, it is likely that this was the case.

4.3 Concluding Comments

Although I am critical regarding the Court’s and the AG’s conclusion that the Austrian State was not an undertaking in the case and with regard to how the

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133 See especially Article 11(2) where it is stated that he 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.
two came to their conclusions, I realise that there are underlying issues of a federal character.

Foremost, there is one issue that the Court might have had in mind when concluding the **Compass** case: to what extent should EU competition law intrude in the Member States own right to decide what is public and what is private? There are considerable legal and political aspects in answering this question that must be addressed and it is hard to find a correct answer to it. One thing is however certain and it is that the undertaking concept lies in the core of answering this question; it is the determinative factor when assessing which activities are private and which are public. Considering this, and, for instance, that Article 345 of the TFEU states that the Treaties in no way should prejudice the rules in Member States governing the system of property ownership, I understand and recognise this question, which is fundamental for the whole concept of the EU, the Court must have been struggling with. In analysing such a complex issue, a wide variety of aspects and purposes must be scrutinised and assessed. Therefore, under the finalising Section ‘6. Conclusions’, I will suggest and motivate a modified definition of an undertaking under EU competition law to tackle this dichotomy.
PART II
5. Re-use According to the New PSI Directive (2013/37/EU)

After studying the current PSI Directive it is clear that the Directive confers upon the Member States the right to decide two separate issues. The first relates to the question of when access to public documents is allowed. This is, naturally, the first stop for a private company seeking to re-utilise public documents. In recital 9 of the PSI Directive it is stated that the Directive builds on the existing access regimes in the Member States and does not change the national rules for access to documents. Thus, to simply get to look at a given document, the document must be duly public under the Member States’ domestic laws on access to public documents. The second issue is that of when re-use is allowed which is crucial for a prospering PSI industry; there is no point in only looking at a document without being able to use it. As has been held many times in this Thesis, the PSI Directive does not contain an obligation for Member States to allow re-use. Recital 9 states that the decision whether or not to authorise re-use remains with the Members States or the public sector body concerned. Therefore, to utilise the potential of certain documents, one must first be allowed access to them and, secondly, be authorised to actually use them.

5.1 The Scope for Access to Documents and the Scope for Re-use of Documents Construed under the New PSI Directive (2013/37/EU)

In recital 7 of Directive 2013/37/EU (i.e. the New PSI Directive) it is reminded that Directive 2003/98/EC does neither contain an obligation for Member States concerning access to documents, nor an obligation to allow re-use of documents. It is then stated that it is a source of legal uncertainty that Member States have two sets of rules; one governing access to documents and one governing the right to re-use. With this motivation, recital 8 tells us that Directive 2003/98/EC should be amended to lay down a clear obligation for Member States to make all documents re-usable unless access is restricted or excluded under national rules on access to documents and subject to other
exceptions laid down in the Directive.\textsuperscript{134} The access regimes in Member States will remain their responsibility.

The New PSI Directive thus comes with a significant change when it comes to the possibility to re-use public documents. Private companies will, when the Directive is in force throughout the EU, only have to be concerned with the regimes governing access to public documents in the respective Member States. If access is granted, re-use must be allowed on, for example, non-discriminatory terms. It remains to be seen exactly how the Directive will be transposed in the Member States. However, if access regimes in the Member States are sound and based on a genuine right to access public documents as the main rule only with exceptions that protects, in particular, privacy and business secrets, the initial purpose of Directive 2003/98/EC to, \textit{inter alia}, allow European companies to exploit its potential and contribute to economic growth and job creation\textsuperscript{135} will hopefully be achieved in a prospering PSI industry in the EU.

\textsuperscript{134} For an example of an exception laid down in the Directive, see the amendment of Article 3 (the General principle), where it is stated in Article 3(2) that documents, in which libraries, including university libraries, museums and archives hold intellectual property rights, the equivalent rules as those in Directive 2003/98/EC will govern access and re-use.

\textsuperscript{135} See recital 5 of Directive 2003/98/EC.
6. Conclusions

6.1 The Undertaking Concept

PSI is a subject that touches upon a number of different areas of law. With questions regarding fundamental legal issues such as the right of access to public documents, privacy protection, competition law and IP law, it raises profoundly complex questions. I chose to investigate the intersection between PSI and competition law because it is an intriguing issue where competition law could be a tool for private companies to utilise the potential of PSI. In doing this, my conclusion is that the definition of an undertaking, as a majority of case law stands today, does not rule out the possibility of a public sector body being an undertaking when it re-uses PSI outside its public task and, therefore, risk abusing its dominant position by not allowing re-use of its PSI. However, as I stated above when concluding my comments on the Compass case, I recognise that there are significant considerations that must be addressed when striking a balance between what is public and what is private. In a PSI setting, public sector bodies produce PSI within their public tasks, i.e. they should own the PSI, and, hence, the respective Member State is the owner of the PSI it produces. Therefore, if a public sector body is deemed an undertaking and abuses its dominant position by refusing to allow re-use of PSI, EU competition law intrudes on the Members States’ right to decide on their own property ownership. Something that Article 345 of the TFEU tells us that the Treaties of the EU should not do. However, competition law has decided what is private and what is public many times before which can be seen from case law that I have presented above. In order to strike a more sophisticated balance regarding the private/public dichotomy, I would like to propose an additional element in the definition of an undertaking.

As the definition stands today, there must be an economic activity consisting of the offering of goods or services on a market with the potential to make profits. Moreover, the activity in question cannot be exempted by being connected to essential functions of the State. This definition is a suitable first step but it does not really deal with the federal issue I presented above. The doctrine of essential functions of the State only addresses activities that are necessary for the protection of a certain interest, such as the maritime
environment or air navigation safety.\textsuperscript{136} It is certainly justifiable that such activities are exempted from the competition rules since the aim of those activities could be jeopardised if they were subject to the competition rules. However, in Compass there were neither a legitimate such interest that could be jeopardised, nor a certain interest that needed to be protected; the activity of transferring the Firmenbuch to the billing agencies was not an essential function of the State. To tackle the federal implications of the undertaking concept when it is the decisive factor in assessing what is private and what is public, I propose that another element must be added to the undertaking definition. After assessing economic activity and essential functions of the State I believe it is necessary to establish whether it is federally justifiable for a given activity to be governed by competition law. This element provides the legal tool for the Court to explain what it could not explain in Compass and to reason where the line is to be drawn when it comes to sovereign State activities which the EU and, hence, the Court simply cannot, or, more accurately, are not allowed to, for the lack of a better idiom, “stick its nose into”. Under this element the Court is allowed to consider the foundations of the EU vis-à-vis the purposes of EU competition law, which is an issue that cannot be touched upon under the current definition of an undertaking.

If the Court had introduced this element in Compass or considered the question without revising the undertaking concept, I believe that the New PSI Directive could have been of guidance. The New PSI Directive, as I presented above, stipulates a clear obligation for public sector bodies to allow re-use of documents when they are due public. Hence, the federal issue already seem to have been considered when the Parliament voted and accepted the new amendments.

6.2 Re-use of PSI

When it comes to my main research question of what the current and future scope of access to PSI is, I used the undertaking concept to explain how private companies could use competition law to be allowed to re-use PSI. In my opinion, which I hopefully demonstrated through the case study on Compass,

the current definition of an undertaking allows for competition law to, under certain circumstances, be used in gaining access to PSI. I also explained how the current PSI Directive itself could be used. When interpreting certain provisions in the Directive, it could be argued that once a public sector body has started to re-use its PSI on its own it must allow for others to re-use the PSI.¹³⁷

Lastly, the implications of requesting to re-use public sector bodies’ PSI we experience today will hopefully be remedied when the New PSI Directive enters into force throughout the EU. It will be very interesting to see how Member States has implemented the Directive into national law. In having knowledge about the liberal regime governing the constitutional right to access public documents in Sweden, I cannot imagine how the PSI industry will not boom if the New PSI Directive is implemented correctly.

¹³⁷ See recital 9 and Articles 2(5) and 10-11 of Directive 2003/98/EC.
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