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1. ABSTRACT

The following analysis is aimed at discussing Intellectual Property and Competition related Issues of Public Sector Information. Therefore this work is divided into two parts. As to the first part on Intellectual Property, this focuses on particular issues such as digitization, cultural institutions and fair uses or works exempted by the protection. Please note that the part of Intellectual Property of this deliverable was written on the basis of national responses to the questionnaire provided by the LAPSI 2.0 partners, which did not intended to be exhaustive. As to the second part on Competition, this work focusses on the relationship between PSI access and re-use and Competition norms and case law at both the EU level and the national level in the EU.

The overall aim of this work is to identify legal principles to enable an easier interpretation of PSI rules for optimizing the (access and) re-use of data.

PART I. INTELLECTUAL PROPERTY RIGHTS

I. INTRODUCTION

I.1 INTELLECTUAL PROPERTY AND PSI RE-USE

Intellectual property philosophically aims to promote useful creative and/or inventive activities. Instruments of intellectual property law are in that sense used namely to protect the results of creative and/or inventive work[1].

The concept of intellectual property is philosophically based on grounds that originate in the end of 19th century and are founded on similar principles as the protection of tangible property[2]. The economic value of intellectual property is projected as a correlation between supply and demand, whereas the basis of the economic evaluation is the scarcity of the resource, or in other words, the (lack of) availability of protected creations or inventions[3]. As such the primary aim of Intellectual property laws is the creation of a situation where the creator or author has under his or her control the physical availability of the work[4] and is able to control and exploit its economic value[5]. For example, the value of a book is in this system generated by the willingness of readers to pay for its physical possession, whereas the supply of physical copies is limited.

It means that the applicable intellectual property laws are primarily based on restrictions. Regardless of whether we speak about copyright, patents or other forms of intellectual property, the law creates an implicit restriction to all forms of use of protected outcomes of creative and/or inventive activity once such an outcome is legally recognised (that might happen per se like in the copyright law or by a registration like in the case of patents or industrial designs).

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[1] See for example the introductory part of Goldstein, P. Intellectual Property: The Tough New Realities That Could Make or Break Your Business, London: Penguin Books, 2007.

[2] Despite its terminology, intellectual property still differs in many respects - see Evans, D. E. Who Owns Ideas? Foreign Affairs, 2002, vol. 81, p. 160.

[3] Se efor example Lüder, T. Next Ten Years in E.U. Copyright: Making Markets Work, Fordham Intellectual Property, Media and Entertainment Law Journal, 2007-2008, vol. 18, p. 1.

[4] The aspect of absolute control of information has, however, never been present in the structure of intellectual property. This was noted, among others, also by Lawrence Lessig in his book Freeculture: "We have always treated rights in creative property differently from the rights resident in all other property owners. They have never been the same. And they should never be the same, because, however counterintuitive this may seem, to make them the same would be to fundamentally weaken the opportunity for new creators to create" – see Lessig, L. Freeculture, New York: The Penguin Press, 2004, p. 118.

[5] See Ghosh, S. The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets, University of California Davis Law Review, 2006-2007, vol. 40, p. 855.

In that respect, we need to assume that intellectual property laws should be taken into account with regards to PSI re-use as a purely limiting factor. To put it short, intellectual property, yet forming and important part of PSI re-use legal regulatory framework, cannot do any good to PSI re-use. We will specifically turn to GLAM institutions later on, but the exemption of works covered by third party intellectual property rights might tempt these cash strapped institutions to engage the services of third parties, or should one say third party investors, to assist with their digitisation efforts and to grant them some form of intellectual property right in the outcome. That would effectively bring these works outside the scope the PSI Directive and re-enforce the potential negative impact of intellectual property.

We will see later on though that copyright can, against expectations, play a positive role in relation to public sector works, in combination with a generous and well-developed licensing policy.

II.2 INSTRUMENTS OF INTELLECTUAL PROPERTY THAT AFFECT PSI RE-USE

In recent work under LAPSI and LAPSI 2.0, we examined the following forms of intellectual property and analysed the following general ways in which they affect processing and re-use of public sector information[6]:

- Copyright – the most frequently and the most complicated protective instrument affecting different sorts of PSI. Besides mere scope of copyright protection of PSI in different Member States, there is namely a question of presence and relevance of third party rights in PSI and practical problems with regards to various licensing schemes.
- The sui generis database right - this protection affects the re-use of public sector databases even when they are not regarded as pure copyrighted works (i.e. those that lack per se creative element). Despite being similar in their nature to copyright, the catalogue of practical problematic issues arising from database rights with regards to PSI re-use is slightly different and contains questions of technical parameters of databases (namely formats), their continuous v. repeated availability, integrity rights etc. It is also to be noted that sui generis rights are relatively new compared to copyright or other intellectual property rights, so there is a lack of case-law and established practices even as to the mere question of what actually is protected and to what extent.

We observed that trademarks and other protected indications as well as patents and similar instruments (e.g. utility designs) or industrial designs do not generate any significant practical legal problems in PSI re-use. However, we noted that, in the EU, substantial amount of investment into inventive industries is targeted at producing

[6] See also Sappa, C. Selected Intellectual Property Issues and PSI Re-use, Masaryk University Journal of Law and Technology, 2012, vol. 6(3), p. 445.

inventions that were already made and patented before[7]. The original purpose of patent law is to provide for general publicity of useful inventions and to prevent not just their unauthorised use but also waste of similar inventive efforts. In that respect, we have to state that existing methods providing for availability and re-use of information stored in public patent and utility design databases do not provide for sufficient distribution of information as to inventions already made and protected. That issue, however, falls outside of the scope of this recommendation[8].

I.3 IP v. PSI RE-USE IN THIS POSITION PAPER

By analysing a number of practical forms of PSI re-use, we identified copyright as the most frequent and the most problematic instrument of intellectual property law. Having tackled licensing in other outcomes of this project[9], we decided to focus in this policy recommendation primarily on public works as a phenomenon of copyright law that is specifically important with regards to PSI re-use. In that respect, we tried to comparatively analyse not just formal definitions of public works, but rather to pragmatically examine practices in the application of this concept in actual cases of PSI re-use.

Besides that, we identified specific need to elaborate on copyright limitations that apply in the course of operations of cultural institutions. These institutions physically hold significant amounts of national and European cultural heritage whose re-use, namely through services of information society, is of high public interest. The cultural content itself (let it be books, works of art, archeologic items etc.) is not in many cases protected per se by copyright or any other intellectual property right. However, its processing in order to enable its re-use (namely digitisation) might in typical cases generate copyright concerns that need to be addressed.

Thus, we decided to focus on typical intellectual property law issues arising of PSI processing and re-use by cultural institutions. In addition, we tried to identify and discuss recent specific concerns that arise of copyright and related forms for protection of digitised cultural content.

[7] See Scotchmer, S. Standing on the Shoulders of Giants: Cumulative Research and the Patent Law, The Journal of Economic Perspectives, 1991, Vol. 5(1), No. 1, p. 29.

[8] This problem was noted by the Commission in 1980, but very little was done in that respect despite massive introduction of ICT since then. See Thomsen, E. Access to patent information and documentation in public patent libraries, World Patent Information, 1981, vol. 3(3), p. 103

[9] See for example LAPSI 2.0 Licensing Guidelines or License Interoperability Report – both available at www.lapsi-project.eu.

I.4 CHANGES IN COPYRIGHT PRACTICE THROUGH PSI RE-USE LAWS

In order to get a proper picture of the operational mode of copyright law with regards to PSI re-use, we engaged in the aforementioned comparative study[10]. It led, besides particular findings regarding public works, also to a general conclusion as to the existence of a number of small, yet practically important, differences among copyright laws of participating Member States. In result, we had to state that relevant provisions of copyright laws create, from the perspective of the common market, quite a spectacular patchwork consisting of mutually different approaches as to what of PSI is protected and to what extent.

It is obviously not the task of this policy recommendation to address the general problematic issue of missing factual harmonisation of copyright laws of the Member States. On the other hand, we found that it is possible to overcome this problem by appropriate implementation and interpretation of the PSI re-use Directive. In other words, we noted that harmonisation of the PSI re-use Directive in different member states can provide for concerted practice in copyright protection of PSI without a need to amend copyright laws.

I.5 APPROACHING THE ISSUE (METHODOLOGY)

Besides the aforementioned findings, the comparison of actual practice of the application of the copyright concept of public work led us also to the conclusion that the comparative method is a relevant part of the methodological toolbox for this task[11]. In theory there should be no need to compare harmonised jurisdictions, however we noted that such comparison is inevitable in order to examine the actual impact of copyright protection on PSI re-use. This does not mean that there is a reason to doubt the compliance of participating Member States with the requirements of copyright harmonisation Directives, but we did find that when it comes to PSI re-use on the internal market, even prima facie insignificant diverse details in national copyright laws matter.

[10] Best practices analysis that came out from the comparative study was published as LAPSI 2.0 Best Practices in IP Report and it is available at www.lapsi-project.eu.

[11] For basics of comparative methodology, see for example Zweigert, K., Kötz, H. An Introduction to Comparative Law, transl. Weir, T. Oxford: Oxford University Press, 1998 or Glenn, P. Legal Traditions of the World. New York : Oxford University Press, 2004.

A second core component of the methodology of this position paper is the pragmatic legal method[12]. The inevitability of its application arises namely from the fact that the respective issues are partly of a technical nature. Especially when it comes to databases or digitisation, legal interpretations need always to be tested against factual technological limitations, recent technical usages or against the nature of objectively existing market mechanisms. In that respect, the pragmatic method offers stable grounds for taking all relevant legal, technical, social and other aspects into proper account[13]. In other words, the pragmatic methodology provides for solutions that are not just theoretically legally arguable but that can actually work in practice[14].

II. COPYRIGHT EXCEPTIONS FOR PUBLIC SECTOR WORKS

II.1 STATUS QUO ANALYSIS

Despite a relatively high level of overall harmonisation of copyright laws in the Member States, there are a number of particular issues where substantial differences still prevail. One of such cases is the copyright protection of works produced by public institutions in the course of fulfilment of their regular public tasks (public works).

These works represent an important part of the overall scope of the PSI Directive and so it was crucial for the project team to analyse the extent to which copyright law might limit or promote their re-use. Thus, a comparative study was undertaken to find out not just about particular forms in which public sector works are legislated in national copyright laws but also to map factual effects of everyday use of specific protective instruments or exceptions.

The primary goal of the comparative study was to provide for a comparative analysis of actual practices that are based on national copyright instruments that specifically apply to public works. The secondary aim of the study was to determine whether there is any correlation between protective instruments of national copyright laws and the actual ways in which respective types of PSI are being made available for re-use. In particular, the project team focused namely on relations between the scope of copyright exemptions and the scope of availability of PSI for re-use.

[12] Basic of pragmatism are well described in collected lectures of William James who reportedly give pragmatic methodology its name – see James, W. Pragmatism. Rockville: ARC Manor, 2008.
[13] On the contrary, positivist or naturalist methodologies always keep certain distance from actual reality – see Samuel, G. Epistemology and Method in Law. Hampshire: Ashgate Publishing, 2003, p. 24.
[14] See for example Rorty, R. The Banality of Pragmatism and the Poetry of Justice, Southern California Law Review, 1990, Vol. 63, p. 1811.

As it was noted in D 3.1 of March 2014, the results of this comparative study were quite surprising as the differences among the Members States turned out to be more significant than in other fields of copyright law.

Whereas in the U.K., public works are not specifically exempt from copyright protection, the scope of copyright exemptions differs greatly among other Member States. In some countries, public works are defined very broadly and their exemption from the universal copyright regime is total, while other Member States have their exemptions defined more narrowly, so that they might include only e.g. binding legal instruments (black-letter laws, judicial decisions etc.).

As to the mere scope of the copyright definitions of public works, the project team noted in a number of jurisdictions the lack of representative case-law. In result, it might be difficult to determine particular limits of public works exemptions in cases of borderline PSI namely in countries where the copyright definitions of public works are more narrow. For the same reason, it was also impossible to determine in these cases whether national courts tend to assume the protection or the exemption of respective works in cases where their classification as public works is disputable.

Finally, the project team noted a significant number of jurisdictions that have implemented extensive exceptions of public works, but it is still unclear whether these exemptions apply also to the sui generis database rights. In these cases, exemptions are expressis verbis legis made as to the copyright protection, whereas sui generis protection falls outside of the scope of copyright. Consequently, it will have to be clarified by courts whether public databases are exempt from sui generis protection analogically to the exemption from copyright or whether sui generis protection applies (both options are technically possible)[15].

II.2 SCOPE OF COPYRIGHT EXEMPTIONS AND AVAILABILITY OF PSI

Another surprising finding of the comparative study is related to the relation between the scope of copyright exemptions of public works and their availability for re-use. The project team assumed that countries with broader exemptions of public works from copyright protection would also report a broader scope for and more benevolent schemes of PSI re-use. It was also assumed that the actual practice of PSI re-use in jurisdictions with broader copyright exemptions will be technically simpler due to the fact that there is not need for any extensive licensing schemes or arrangements.

Both of these assumptions turned out to be completely wrong. In particular, the comparative study showed that U.K. with the most restrictive copyright rules (e.g. public

[15] Sui generis rights might be in some respects even stronger means of protection than copyrights. Thus, they deserve specific attention – see Deveci, H. E. Databases: Sui Generis Stronger Bet than Abstract Copyright? International Journal of Law and Information Technology, 2004, Vol. 12(2), p. 178.

works are not exempt from copyright protection[16]) reported a broad variety of PSI available for re-use as well as the existence of highly efficient schemes for their licensing. On the contrary, some countries with broad copyright exemptions of public works reported a number of technical difficulties or administrative obstacles that factually burdened the process of making the PSI available for re-use. Thus, it seems that statutory copyright exemptions of public works matter only insignificantly compared to factual will and ability of administrative bodies to make PSI available for re-use.

In result, the comparative study led to the conclusion that there is no factual relation between the copyright regime of public works and the factual availability of PSI for re-use. In other words, the copyright exemption of public works neither promotes nor blocks efficient re-use of PSI.

In relation to these findings, the project team made an additional observation as to an alternative factual role of copyright protection of public works in PSI re-use. Rather than as a restrictive measure protecting interests of the copyright holder in commercial exploitation of respective works, copyright protection of public works (where applicable) turned out to be in their effect rather protecting the integrity of PSI.

In jurisdictions where extensive copyright exemptions of public works apply, public institutions find it often legally difficult to protect the integrity of PSI that is being released for re-use. Apart from copyright, there are almost no instruments able to provide for adequate protection of PSI against further alterations or manipulations. In that sense, copyright as a restrictive instrument might in these cases prevent not the reproduction or the publication of respective public works but it might rather provide for causes of actions against unauthorized changes of respective PSI. In result, copyright protection of public sector works might in that sense lead to greater certainty of end users of services based on PSI re-use. The positive effect of copyright in this area is mainly due to the fact that it creates certainty. That certainty is created for the licensor, as well as the licensee. Copyright makes it very clear what the exclusive right is, what are the restrictions and what is the licensee allowed to do. The licensee also gets a very positive authorisation to do certain things, and that is also useful to ascertain its position against third parties and other potential licensees. One needs therefore a generous, clear and detailed licensing policy in combination with the rules of copyright to guarantee the positive result.

[16] It is possible to compare this regime not with other Member States, but rather with other common-law countries such as New Zeland – see for example Perry, M. Acts of Parliament: Privatisation, Promulgation and Crown Copyright - is there a Need for a Royal Royalty? New Zeland Law Review, 1998, p. 493.

II.3 FUTURE OF COPYRIGHT EXEMPTIONS

The first and rather obvious resulting position with regards to copyright exemptions of public works is that their existence or scope are almost completely irrelevant to the successful establishment of efficient schemes of PSI re-use. Thus, there is no reason to believe that an establishment or an enlargement of copyright exemptions of public works in surveyed jurisdictions would bring any significant improvements as to the fulfillment of the objectives of the PSI Directive.

One of the rather surprising findings of the aforementioned comparative study was also that there is significant diversity among the Member States not just as to their black-letter copyright exemptions, but subsequently also as to practical measures and organizational procedures that result into the establishment of PSI re-use mechanisms. Although that was not the primary focus of the comparative study, it provided for solid grounds as to the impossibility of finding one copyright solution for public works that would fit all of the Member States surveyed. Even if there is a will to include public works exemptions into the count of copyright issues harmonized by European law, there remain serious doubts about the question whether it would be possible to design a regime that could seamlessly fit all Member States' current systems of functioning of public sector bodies.

The project team found that the existence of copyright protection of PSI (i.e. non-existence of copyright exemptions for public works) does not represent per se any burden to PSI re-use. Moreover, there was even a noted positive role of copyright protection of public works in providing for the integrity control over the PSI that is release for re-use. As the concerns about the integrity of PSI often lead to factual hesitation of public sector bodies in making PSI available for re-use, there is a reason to further elaborate on legal mechanisms that would provide for sufficient safeguards in that sense even in jurisdictions where copyright protection of public works does not apply.

III. GLAM INSTITUTIONS

III.1. STATUS QUO ANALYSIS

This part is dedicated to the institutional analysis of legal issues related to the making available of PSI for re-use by GLAM institutions[17]. The project team decided to focus particularly on this kind of public sector bodies due to their importance in the cultural development of the Member States, their enormous potential as to available sources of re-usable content and also due to the fact that they have been included into the scope of the harmonized PSI re-use regime only recently[18].

It is to be noted first that there is no universal classification of GLAM institutions across the Member States, what makes any comparative study highly problematic. This is not only caused by the fact that legal definitions of GLAM institutions are often missing in national laws, but also in particular by the significant diversity in forms of their establishment, structure of internal organization, relations to other public sector bodies, sources and models of financing etc.

As to the form of establishment, the project team noted that some GLAM institutions exist and operate relatively independently from states, self-governing units or other public sector bodies, i.e. they have their specific legal existence, autonomous decision-making procedures etc., in combination with limited ways of public control or political influence on their functioning. As to the regime of intellectual property rights, this form of GLAM institutional establishment provides for relatively independent IP attribution. In result, these GLAM institutions decide autonomously about their IP rights and are independently legally liable for being compliant with PSI legal regulatory requirements. Typical examples of this class of GLAM institutions are some public libraries that are established and financed by states or self-governing units, but have an independent form of establishment (mostly as non-profit organizations), and that act as owners of their respective property and holder of respective rights.

Other standard form of establishment of GLAM institutions that the project team noted in the Member states is similarly based on an independent legal personality of the GLAM institution while keeping property and IP rights over cultural content at the founding public sector subject (state, region, municipality or alike). In this model of establishment, GLAM institutions independently (i.e. on their own account and liability) administer property or IP rights over the cultural content, but they neither own the respective cultural content nor hold IP rights. Typical examples include some

[17] For basic overview of practical legal issues, see Wienand, J. P. D., Museums and International Copyright Owner: Multimedia Problems, International Legal Practitioner, 1996, Vol. 21, p. 78.

[18] For past work on cultural institutions and their role in PSI re-use, see Bogataj Jančič, M. Pusser, J. Sappa, C, Torremans, P. Policy Recommendation as to the Isuue of the Proposed Inclusion of Cultural and Research Institutions in the Scope of PSI Directive, Masaryk University Journal of Law and Technology, 2012, Vol. 6(3), p. 353.

repositories, archives or galleries that administer, conserve or display collections of highly precious cultural content owned by states or regions.

The third main class of GLAM institutions do not have separate legal existence, i.e. they exist in some form of organizational arrangement within structures of other public sector bodies. Their establishment and functioning incl. dedication of resources, administration of rights etc. is a matter of organizational decisions of the respective public sector bodies. In practice, they also often share utility services, i.e. accounting, legal assistance, internal audit etc., with the rest of respective public sector bodies. Typical examples include namely institutional archives, repositories, libraries that exist within larger public sector bodies like ministries of interior, armed forces, ministries of culture etc. Another typical examples include public cultural funds and grant agencies whose primary aim is to support cultural production by coproducing works of art, e.g. music, theatre, audio-visual works or literature.

The aforementioned institutional distinction is not just important for the issue of de iure attribution of IP rights or liabilities for compliance with PSI re-use rules. The project team noted that the form of establishment plays an important role also as to the factual functioning of technical, organizational and legal mechanisms of PSI re-use. In particular, GLAM institutions that are entirely independent tend to be in general more active when deciding about releasing their PSI for re-use or developing technically innovative solutions for utilisation of respective cultural content. On the other hand, GLAM institutions that are fully integrated into the structures of larger public sector bodies show faster reaction on contemporary political developments, i.e. if the new political representation of respective Member State or region is proactive in PSI re-use, integrated GLAM institutions tend to adapt faster to such change.

Some GLAM institutions are better placed that others to decide on which material they can make available as PSI for re-use and on their licensing policies. In general smaller institutions often lack resources in this area and these then become reliant on an overall policy designed by their larger parent public institutions. If they are independent they face a real problem. Larger institutions often have the resources to develop these policies independently and any oversight by parent public institutions is then rather a hindrance, as the latter do not face the outside world and the re-use scene in the same way. One also needs to draw attention to the fact that GLAM institutions are still allowed to charge under the Directive. Many of the institutions are cash strapped and this can provide a source of much needed income (i.e. to cover a digitisation policy), but one need to take into account that running such an exercise comes with (significant) overheads, including staff costs to run the scheme on a daily basis. Smaller institutions and those with less in demand collections may find that the overheads wipe out most or all of the income.

GLAM institutions may also be tempted to seek assistance from third parties in their digitization efforts. Third parties may bring in technical know-how and technical and financial resources, but they often want exclusivity, or worse, intellectual property rights in the pictures generated (if copyright allows this) and in the metadata generated. The latter could even bring the content outside the scope the Directive.

IV. DIGITISATION

IV.1 STATUS QUO ANALYSIS

Digitization represents one of most vibrant topics of contemporary discourse in intellectual property. Advanced technologies enable us to capture and store different forms of creative or inventive works including texts, audio-visual works, 3D objects and even complex cultural situations like historical buildings or archaeological excavation sites.

The possibility to digitally capture past works provides for nothing less than making all sorts of valuable information relatively independent of the tangible substance. While the ways in which information contained in books, paintings or works of architecture can be utilized are limited by the physical availability of respective tangible objects, digital forms of this information enable the emergence of endless possibilities of its reproduction, dissemination and utilization at almost no marginal costs or efforts[19]. Besides that, digitization can save precious information from damage or destruction that inevitably follows physical damage to its carriers[20].

Despite the fact that it is possible to oppose the benefits of digitization by arguing that no reproduction method can adequately replace the original, it remains undisputable that having a digital copy (or picture, 3D model, simulation etc.) is better that having nothing at all. Consequently, the main benefit of digitization is not to be seen in the fact that it can technically alter the conservation or preservation of original works, but that it can provide for entirely new forms of utilization of valuable content that would be under normal circumstances available only to a very limited audience and for very limited forms of re-use.

[19] Positive impacts of availability of information represent one of key topics of newly emerging discipline of cultural environmentalism – see Cunningham, R. The Tragedy of (Ignoring) the Information Semicommons: A Cultural Environmental Perspective, Akron Intellectual Property Journal, 2010, Vol. 4(1), p.1.

[20] For detailed explanation of various positive effects of digitisation and subsequent availability of cultural content, see Madison, M. Frischmann. B. T., StrandburG, K. Constructing Commons in the Cultural Environment, Cornell Law Review, 2014, Vol. 95, p. 657.

In that sense, Europe with its unmatched richness of cultural heritage must play a leading role in the digitization of its creative and inventive content – not primarily for conservation purposes but mainly in order to provide for broader availability of all sorts of useful information for further utilization[21].

A number of digitization projects already emerged as a matter of various private and public initiatives. Besides enormous potential for further utilization of digitized content, they also bring concerns as to a number of organizational, technical and legal issues[22]. The project team investigated and discussed some of these concerns and noted their emergence as well as their complex nature[23]. The following analysis tries to outline and briefly describe most emerging problematic issues of re-use of content digitized from sources held by public institutions.

IV.2 PHYSICAL ACCESS TO THE ORIGINAL CONTENT

Public institutions around Europe physically hold enormous collections of content that is suitable for digitization and further re-use. Public cultural institutions like museums, archives or libraries typically preserve repositories that contain cultural content produced by external entities, while public universities, art agencies and similar establishments engage not just in the storage of such content, but also in its original production. Besides that, there are a number of other public bodies that produce or keep enormously rich repositories, not as their primary activity, but besides other public tasks – e.g. the armed forces, ministries, local administrations etc.

In all such cases, public institutions physically hold tangible substance bearing the informational value – let it be books, paintings, objects or anything else. Despite the fact that these objects can be qualified as works of art, it is often not copyright law that limits their digitization and re-use, but rather property rights to the respective tangible objects.

One of the leading principles of the legal regulatory framework of PSI re-use is the non-discrimination of re-users[24]. However, all consequent provisions apply to information, so there are no legal measures that would provide for any kind of protection against

[21] It is a bit paradoxical that cultural interests are often presented as contradictory to principles of trade and that such contradiction is also present in sources of international law – see Burri-Nenova, M. Trade and Culture: Making the WTO Legal Framework Conducive to Cultural Considerations, Manchester Journal of International Economic Law, 2008, Vol. 5(3), p. 2.

[22] See for example Bollier, D. Why We Must Talk about the Information Commons, Law Library Journal, 2004, Vol. 96(2), p. 267.

[23] See Cornish, W. Conserving Culture and Copyright: A Partial History, Edinburgh Law Review, 2009, Vol. 8, p. 8.

[24] See for example Leith, P. McCullagh, K. Developing European Legal Information Markets based on Government Information, International Journal of Law and Information Technology, 2004, Vol. 12, p. 247.

discrimination when it comes just to physical availability of tangible objects. Even in countries with extremely broad access rights, it is always possible to force public sector bodies to extradite information, but not tangible objects.

Simple enlargement of the scope of non-discriminatory treatment also to culturally relevant physical objects that are being owned (or held) by public sector bodies, however, does not seem to be a viable solution for this problem. One reason is that the scope of such enlargement might bring highly problematic consequences to the everyday operations of public sector bodies - one can imagine for instance endless requests for furniture, paintings or other items used as decorations at the premises of public bodies. Another reason for the rather exclusive or selective basis on which objects should be made physically available for digitization is that physical manipulation required for digitization might, despite being done with maximum care, negatively affect the condition of the respective objects. In that sense, it is often desirable to expose tangible objects to digitization not more frequently than what is absolutely necessary in order to get proper digital images.

In any case, the impossibility of the application of harmonized PSI re-use rules or national PSI access rules makes it inevitable to tackle the issue of physical availability of culturally relevant objects within the scope of national rules regulating the disposal of public property and the conservation of cultural heritage. In that respect, there is a reason to work on specific national rules that would provide for fair access to physical objects for digitization purposes.

IV. 3 SCOPE OF PROTECTION OF DIGITIZED CONTENT

One of the questions emerging from the above mentioned issue of physical availability of the original objects is related to the possibility of copyright protection of images resulting from the process of their digitization. Although there might be already no copyright limitations applicable to the originals, e.g. to old books, works of art, movies, 3D objects etc., it is possible in some jurisdictions to apply copyright protection to their digital images. This does not only relate to situations when digitization includes substantial creative input in the sense of creative digital restoration or improvement of the original content (e.g. in the case of motion pictures or 3D modeling of archaeological excavation sites), but in some cases also to scans of books, photographs or paintings.

The possibility of copyright protection of digital images might then provide for an emergence of subsequent copyright protection of old cultural heritage that itself is not protected by copyright[25]. In a situation when the original works are being made available for digitization by public institutions and there is an inevitable need for some

[25] See for example Alterwain, A. Google Books and Digitisation of Libraries: Fair Use or Extension of Copyright? Convergence, 2007, Vol. 3(2), p. 139.

level of exclusivity as to the access (see above), it might result into the paradoxical situation in which digitization of public domain objects made available by public institutions might establish entirely new forms of copyright exclusivity.

In order to tackle this issue, there is, first, a need to analyse to what extent the copyright protection might apply in particular jurisdictions to digital images of different sorts of objects[26]. Secondly, there is a need to identify the consequent risks as to the resulting copyright exclusivity and to develop best practices or to eventually lay down specific binding rules for public sector bodies in relation to agreements upon which the original objects are made available for digitization.

IV. 4 EXCLUSIVITY AND SUBSTANTIAL INVESTMENT IN DIGITIZATION

It was mentioned supra IV.2 that when it comes to digitization, certain forms of exclusivity might be actually appropriate or even inevitable. In particular, it would be difficult to avoid the exclusivity as to physical access to the original content.

Apart from that, there is also a reason to consider in particular cases the admissibility of ex post legal or factual exclusivity to the digitized content itself. The process of digitization often requires the use of special equipment and it might also involve substantial investment as to time of highly skilled professionals.

In some Member States, resources for digitization can be provided from public funds[27], while in other cases, there are no funds immediately available to cover this task. For the latter case, there is a need to establish commercial incentives that would stimulate the availability of private funding of digitization projects.

The current solution in Art. 11(2a) of the Directive (the so-called Google clause) provides for a general exemption of digitization agreements from the ban on exclusive arrangements for PSI re-use for up to of 10 years (with a possibility of, theoretically, endless extensions).

It is then disputable whether such general exemption truly serves the purpose of an extraordinary commercial incentive. In particular, it is questionable whether the exemption of these exclusive agreements should not be limited only to cases when public resources are not used or cannot be used.

[26] Even in cases when copyright does not apply on digitised works, there might still be possible to apply sui generis protection of databases – see Colston, C. Challenges to Information Abstract Retrieval - a Global Solution? International Journal of Law and Technology, 2012, Vol. 10(3), p. 294.

[27] See for example Orssich, I. State Aid for Films and Other Audiovisual Works - Current Affairs and New Developments, European State Aid Law Quarterly, 2012, Vol. 1, p. 49.

IV. 5 PHYSICAL ACCESS TO THE DIGITISED CONTENT

Apart from the aforementioned legal restrictions, digitized content might be restricted as to the possibilities of further re-use also technically, in particular by proprietary file-formats and DRM. Apart from consumer lock-in, both measures lead to a significant decline in the possibilities as to the re-use of such content[28].

When digitization of public content (or content stored by public sector bodies) is done by private entities, public sector bodies might restrict the use of proprietary file-formats and/or DRM by contractual clauses. There are, however, no mandatory provisions in the applicable laws of the Member States that would oblige the responsible public sector bodies to restrict the use of these technical restrictive means in the process of digitization. This can provide for an opportunity for public sector bodies to legally establish de facto exclusive re-use schemes by making it possible for private bodies to digitize respective content without any restrictions as to the file formats, DRM or other technical features.

In addition, DRMs are legally protected per se relatively independently on copyrighted works and the scope of such protection differs among the Member States. While in most countries, DRM might technically protect only copyrights, there are some jurisdictions where DRM might actually protect works (i.e. they might technically limit the use of a work in any way regardless of whether such a form of use is protected by copyright). It is then possible to get subsequent exclusive legal protection even for a non-copyrightable work by technically protecting such work by DRM, because a removal of DRM is illegal per se.

IV. 6 INSTITUTIONAL DIVERSITY

The aforementioned analysis and discussion of problematic issues in digitization and re-use of digitized content applies namely to public sector bodies acting as cultural institutions. However, there is a substantial amount of content held also by public sector bodies whose primary role is different from preserving or promoting cultural production. Ministries, supreme state offices, administrative councils or even local administrative bodies often have rich archives and repositories that contain extremely valuable content whose digitization and consequent availability is more than desirable.

[28] For critical comparative analysis of the role of DRM, see for example Wheatley, C. T. Overreaching Technological Means for Protection of Copyright: Identifying the Limits of Copyright in Works in Digital Form in the United States and the United Kingdom. Washington University Global Studies Law Review, 2007, Vol. 7, p. 353.

In that respect, the role of official public archives is also specific. They are in a number of jurisdictions used for state-backed permanent storage of official documents and their legal classification is not entirely clear. Some jurisdictions treat them as cultural institutions, while elsewhere they are regarded rather as administrative bodies. Apart from their high overall relevance, they play a very special role in post-communist Member States. These specialized official archives provide for the preservation of modern historical heritage that is related to the post-war establishment of authoritarian regimes and their digitization always represents a great commitment to the overall development of political culture.

In that respect, there is a need to distinguish between cultural institutions and other public sector bodies namely as to their position in the structure of the state administration as well as to their internal organization. Regularly, cultural organizations are relatively independent of administrative bodies and their connection to the rest of the public sector is mainly related to their financing. This is typical for museums, galleries, libraries, etc. Non-cultural public sector bodies are, contrary to that, often directly linked with hierarchic structures of the state administration or the local administration and that means that they are not entirely independent in their everyday operations.

In result, the establishment of best practices as to digitization and consequent re-use of digitized content might represent a different task for cultural institutions and other public sector bodies. While administrative bodies can implement proper policies based on informal internal organizational rules adopted by senior institutions (e.g. on the level of national governments), independently acting cultural institutions need to be motivated (forced) to implement proper best practices mainly by formalized laws or bylaws.

PART II. COMPETITION LAW

INTRODUCTION

The efforts of the European Commission are paying off: increasingly governments all over Europe are opening up their data, often without charging for the re-use. This in perfect sync with the spirit and mission of the 2003 and, in particular, 2013 PSI Directives, which both advocate free availability of PSI. In fact, Article 6 of the PSI Directive imposes, as the general rule, marginal cost, as the ceiling, for what fees may be obtained by the Public Sector Bodies (PSBs).

Interestingly, lately incumbent market players have been submitting claims that this change of policy is in fact illicit, harming their commercial interests. They argue that by opening up their PSI these governments are conducting unfair competition practices, or at least inflicting damage.

This claim merits deeper consideration: if these incumbent players are right, this could impact adoption of Open Data policies by governments throughout Europe and in fact frustrate the sound application of the PSI Directive.

A possible collision of the PSI Directive and European competition (law) principles – The LAPSI 2.0 Network has adopted it as the subject of a position paper under WP 3 (IP and competition law). The paper will initially discuss the PSI Directives and the interface between the PSI Directives and Competition law, so to establish what is encompassed by the directives and what should be judge under competition law, respectively. Thereafter some cases from different Member States will be reviewed and analyzed. This is to show that there might be some disfunctionality in reference to the interplay between the legal systems. We therefore conclude with a policy suggestion that the competition authorities should try to establish when competition law is applicable to PSBs, generally, i.e. when an alleged commercial practice also is the PSB's public task.

BACKGROUND

PUBLIC TASKS AND COMMERCIAL ACTIVITIES UNDER THE PSI DIRECTIVE

The starting point of the PSI Directive is the notion that PSBs have been established to perform one or more tasks: the public tasks. This is the raison d'être for the public sector. These tasks are normally laid down in formal laws (like the Law on the Cadastre, or the Law on the National Meteorological Institute) or Governmental Instructions. In the process of performing those tasks – the public tasks – the PSBs accordingly "collect,

produce, reproduce, and disseminate documents." This is the PSI the Directive wants to catch: it wants to apply to the PSI that is produced "anyway", whereby the public task is in fact the demarcation line for application. Accordingly, Art 1(2)(a) says:

"This Directive shall not apply to:

> (a) documents the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned as defined by law or by other binding rules in the Member State, or in the absence of such rules as defined in line with common administrative practice in the Member State in question."

The relationship between public tasks and other (commercial) activities is naturally linked to the perception of the role of government in society. The principles and practices of government differ significantly between the Member States. In some Member States, the government is expected to stay away from the market, while in others it is supposed to take part in it, in order to gather at least part of its funding.[29]

The now amended Recital 9 of the preamble of the PSI Directive explains that activities falling outside the public task *typically* will include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market. This provides some guidance on the limits of the public task and provides a number of features to consider in the assessment of the scope of the public task. The guidance sets out an *example* of supply, which would typically fall outside the public task. Obviously, other indicators for the character of a PSB's activities may be found in national legislation and practices.[30]

The wording of the Directive makes clear that public tasks, in the view of the Directive, can be of both commercial and non-commercial nature. For instance Art. 10 (2), which deals with the situation when a commercial branch of a PSB re-uses the PSB's own PSI, sets out two requirements for applicability: commercial activity and outside public task. If the two terms were to have the same meaning, there would be a tautology. Hence, the Directive leaves room for a discrepancy between commercial and non-commercial public tasks (and non-public tasks), which justifies the need for Art. 10 (2).[31]

The Directive does not seek to harmonize the scope of the public tasks assigned by Member States[32], in particular because this is a national prerogative. Therefore, the answer to the question whether or not commercial activities can fall within the scope of

[29] See further Katleen Janssen, '*INSIPRE and the PSI Directive: Public Task versus Commercial Activities?*' (DPhil thesis, K.U. Leuven, Belgium 2005)

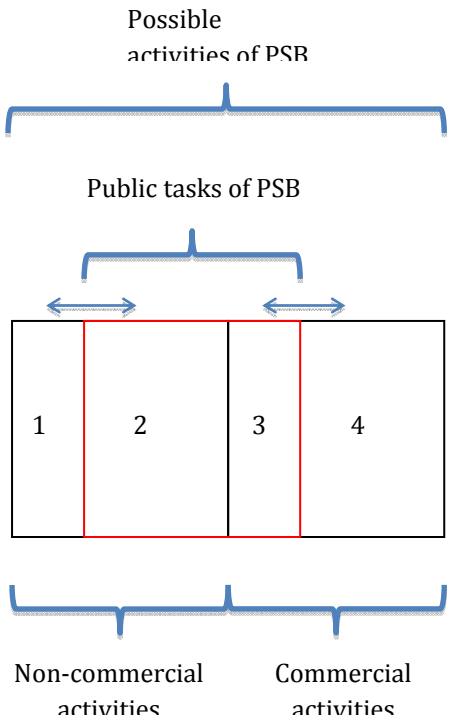
[30] See Katleen Janssen, '*What if...? The Magill case redone under the PSI Directive*' [7 August 2011] European Public Sector Information Platform <http://epsiplatform.eu/content/what-if-magill-case-redone-under-psi-directive> accessed 1 June 2013

[31] See further Björn Lundqvist and others, 'Research report for the Swedish Competition Authority' (2001) 2 Business Activity and Exclusive Right in the Swedish PSI Act, http://kkv.se/upload/Filer/Trycksaker/Rapporter/uppdragsforskning/forsk_rap_2011-2.pdf accessed 2 June 2013.

[32] See Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ 2003 L 345/ 90 (the "PSI Directive")

a PSB's public task will depend on the way the public sector is organizedand controlled in the respective Member States. The PSI Directive leaves room for different perceptions of public task. In some countries, the PSI Directive will cover commercial activities of PSBs and in some countries not, due to different roles of the respective governments. The important thing when implementing the Directive is to design the national implementing regulation in accordance with the existing form of governance.[33]

The figure to the left illustrates how possible activities of a PSB can be divided into commercial and non-commercial activities and how the public task area, represented by the red square, may cover parts of different sizes of these two kinds of activities. Four combinations of activities are possible and the size of each part depends on the governmental regime of which the PSB is part: (1) non-public non-commercial activities; (2) public non-commercial activities; (3) non-public commercial activities, and; (4) non-public commercial activities. The practical cases of (1) may be rare or even only existing in theory, whereas the distinction between the three other fields ((2)-(4)) are of great and practical importance for understanding the scope of the PSI Directive and for assessing the different national implementations.



RE-USE

Art. 2 (4) of the PSI Directive provides that:

> "'re-use' means 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."

Here, the term public task shows up for the second time in the Directive. Interestingly, the definition of re-use requires the original PSI to be *produced* within the public task, whereas Art. 1 (2) (a), as stated above, requires the *supply* of PSI to be a public task. In the light of recital 9 of the preamble of the Directive, the word produced must be interpreted as also including at least the collection and reproduction of documents. Use of such documents for other purposes than the initial purpose for why the data was collected or produced constitutes a re-use. The PSI Directive uses a broad definition of

[33] Cf Janssen (fn 1)

re-use encompassing basically any following activity with the data, as long as the purpose of this re-use is different from the initial purpose.[34]

The last sentence of Art. 2 (4) makes clear that the exchange of documents between different PSBs purely in pursuit of their public tasks does not constitute re-use. This appears like a superfluous sentence, since it seems clear from the first sentence that the situation described does not constitute re-use. The identity of the re-user is irrelevant, but the second use must occur outside a public task. Second use of PSI by the same PSB (i.e. the original PSI holder) within the scope of its public tasks ought not to constitute re-use either, though this is a question of interpretation.

RE-USE BY PSB

As has already been suggested, re-use does not necessarily need to be performed by private sector parties. PSBs can re-use themselves and they can re-use their own PSI. This happens when PSBs use the same documents in activities within their public tasks as in activities outside their public tasks. Re-use by PSBs often involve adding value to the PSI that the PSBs have collected for certain users, or developing added-value products for a comprehensive consumer market, that are constructed from the original data gathered within the exercise of the PSBs' public tasks.[35] Examples of such commercial products are custom-made weather forecasts constructed from meteorological information, or market surveys based on statistical data. The original information collected with public capital and within the exercise of the public task should be available for re-use, in contrast to the commercial information products and services resulting from that information.[36]

A PSB re-using its own PSI commercially is subject to Art. 10 (2) of the PSI Directive and must consequently make sure not to discriminate against other re-users in its charging policy or re-use conditions.[37] Art. 10 (2) of the PSI Directive states:

> "If documents are re-used by a public sector body as input for its commercial activities which fall outside the scope of its public tasks, the same charges and other conditions shall apply to the supply of the documents for those activities as apply to other users."

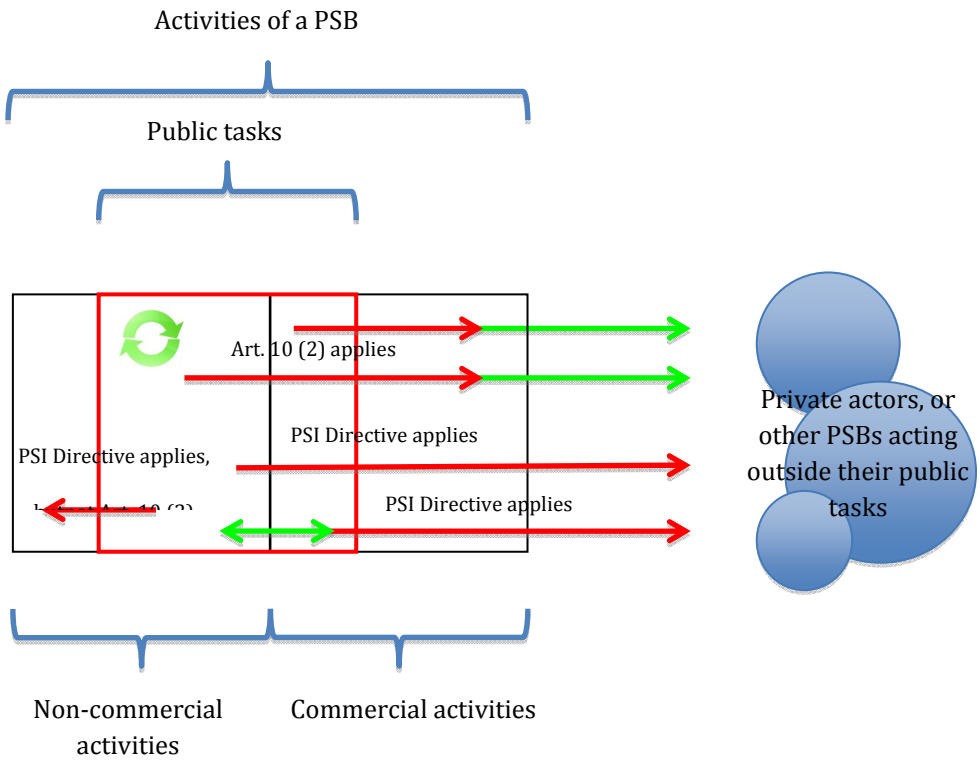
Thus, a PSB must use the same terms and conditions on itself as on third parties when using PSI documents as an input to: (i) commercial activities that (ii) fall outside the scope of public task. Thus, the wording public task shows up for the third time in the PSI Directive, but this time together with the term commercial activity. Important to notice is that for Art. 10 (2) purposes, it is the PSB's *re-use activity* that needs to fall *outside* the public task for the non-discrimination clause to apply, and not its initial supply of the PSI in question.[38]

[34] *Lundqvist* (fn 3)
[35] Cf *the "PSI Directive"* (fn 4) and *Lundqvist* (fn 3)
[36] *The "PSI Directive"* (fn 4)
[37] See also *Lundqvist* (fn 3)
[38] See further *Lundqvist* (fn 3)

Even though, as concluded above, non-public non-commercial activities of a PSB ((1)-cases in the figure above) must be rare, one can ask what happens if a PSB re-uses its own PSI for non-commercial purposes outside its public tasks. Then Art. 10 (2) is not applicable, but the rest of the provisions in the PSI Directive might apply. Art. 10 (1) states that any applicable conditions for the re-use of documents shall be non-discriminatory for comparable categories of re-use. Thus, this non-discrimination provision applies when a PSB re-uses PSI for non-commercial purposes, but it is less strict than the absolute discrimination prohibition in Art. 10 (2), as it allows different conditions for different categories of re-use.

The structure of the PSI Directive is knotty whereby the term public task appears three times. First, the *genesis* of the PSI must have occurred within the public task for the PSI Directive to apply. Secondly, the *supply* of the PSI must be an activity falling within the public task of the PSB holding the document. At the same time as these public task requirements must be met in order for the Directive to apply, the public task also functions as a shield *against* the application of the Directive. As long as the PSI does not leave the public task-area, the Directive does not apply. First when the PSI leaves the safe harbor of public task and reaches actors outside that area, does the PSI Directive kick in. This might also explain why Art. 1 (2) (b) utilizes the term supply. The supply of PSI is an out-reaching activity, which is a necessary element for this transportation of PSI, from public task to non-public task, to take place.

The figure below illustrates when the PSI Directive becomes applicable in terms of public task, commercial activity and re-use. The red arrows indicate that the PSI Directive applies to the transfer of PSI, and green arrows indicate that the PSI Directive is not applicable. Thus, the PSI first needs to have its origin in the red square (the public task area) for the Directive to apply (all red arrows start within the red square). But the PSI also needs to leave that area for the Directive to apply (all red arrows end outside the red square). When the PSI leaves the public task area and reaches external actors, the Directive applies. When it leaves the public task area but stays within the PSB, and is an input for the PSB's commercial activities, Art. 10 (2) becomes applicable. This means that the external actors receive the same position in relation to the public task part of the PSB as the commercial branch of the PSB does. The external actors have the right to receive the PSI on the same terms and conditions as the commercial branch of the PSB. If the PSI documents are used as an in input to commercial activities falling inside its public task, Art. 10 (2) is not applicable. If the PSI leaves the public task area and stays within the PSB but as an input to non-commercial activities, the Directive applies, as the re-use requirement is still met, but Art. 10 (2) does not apply.



This way of defining the scope of the Directive is to some extent in line with general competition law. It is only when the PSI leaves the public task-area that PSBs are acting as (potential) competitors on a (hypothetical) market. A PSB re-using PSI outside the public task, which by the way could be a pleonasm considering the definition of re-use[39], should not be in any superior position compared to a third (market) party looking to re-use the same PSI.[40] Accordingly, the PSI Directive creates a level playing field between PSBs and other re-users: as soon as a PSB leaves the public task territory, it loses its "competition (law) principles immunity" and the absolute discrimination prohibition in Art. 10 (2) becomes applicable.[41] Again, though, this transit between the PSI Directive and general competition law is a bit more complex, as the different terms used to define the scope of the PSI Directive and to define the scopes of other competition provisions create an overlap between the legal frameworks, whereby there is a possibility for situations to arise where both the PSI Directive and competition provision apply and where there may be incidents of disharmony.

Under the Open data initiative, increasingly governments all over Europe are opening up their data, often without charging for the re-use. It is in perfect sync with the 2003 and, in particular, 2013 PSI Directives, which both advocate free availability of PSI. In fact, Article 6 of the PSI Directive stipulates as a general rule that "[w]here charges are made for the re-use of documents, those charges shall be limited to the marginal costs incurred for their reproduction, provision and dissemination". Nonetheless, an underlying idea of competition law is that transactions take place for remuneration

[39] Cf supra.
[40] See *Lundqvist* (fn 3) 34-35
[41] Ibid.

reflecting market price. When the PSBs give access to PSI without charges both on the wholesale level and in the end-user market the principles of competition law and the PSI Directive may not correspond or even be contrary to each other. However, it depends in part on the definition of public (commercial) task and the size of ”the public power and thereto connected conduct exemption” under Competition law. In part, it also depends on what weight you put to the argument: "we can provide this kind of service on a commercial basis. Hence, the state should not make such services a public task and provide the same service to citizens for free.” Perhaps, it is actually creates an incentive to dynamically compete. Thus, the PSI Directive does not provide any basis for arguing that it aims at preventing PSBs from providing such services for free. Although the policy objective of the directive is to create markets for commercial added-value information markets that build on PSI re-use, the other objective is to make PSI available to citizens. It is important that open data policy does not exclude commercial re-users from the market, while it also facilitates a dynamic incentive to enrich and improve re-users services. Even more importantly, private re-users can aggregate data from different sources which is more difficult for PSB. In sum, open data policies put economic pressure on commercial re-users, but such pressure also create incentives for enhancing the quality of added-value services of commercial re-users.

This disharmony will be examined more fully below.

Again it becomes clear that the PSI Directive raises questions concerning the position of PSBs on the market and in society. If a PSB offers commercial information products on the market, the basic data it used for the product has to be available to the private sector on the same conditions as the PSB obtained them. Of course, this will be quite a challenge in practice, as the PSB will have to charge itself for documents that were already in its possession for the performance of its public task. To uphold this, a separation between the public tasks and the commercial activities of the PSBs is necessary.[42] It is easily conceivable for a PSB to apply the same conditions on other PSBs as on private actors. But it will be quite a challenge to ensure that the PSB imposes the same conditions on itself as on any other body requesting the same documents, even when no actual transfer of the data is taking place.[43]

[42] See *Lundqvist* (fn 3)

[43] Cf Zita P. Correira, 'Towards a stakeholder model for the co-production of the public-sector information system' [paper, 2005] 10(3) **Information Research** <http://InformationR.net/ir/10-3/paper228.html> accessed 17 October 2014

THE PSI DIRECTIVE IN RELATION TO COMPETITION LAW[44]

EU COMPETITION LAW

The PSI Directive acts and EU competition law are two separate regimes. It should, thus, be the starting point when handling an issue of re-use of PSI held and supplied by a PSB. Both when having found that the PSI Directive applies and when having found that it does not apply, one has to go on to the competition provisions in TFEU in order to find out in which way general competition law possibly complements or extends the provisions (or lack thereof) in the PSI Directive. The correlation between the different terms that govern applicability of general EU competition law and the PSI Directive may be illustrated as in the simplified figure below.

SGEIs are always public tasks and can be conducted by undertakings. SGEIs may under certain circumstances be excluded from the applicability of the TFEU competition provisions (cf. Art 106(2) TFEU), and from the scope of the PSI Directive.[45,46] The exercise of official authority always takes place within a public task and excludes the entity in that case from being regarded as an undertaking. Of course, more requirements need to be fulfilled for the respective set of rules to apply (like the absence of applicable exemptions, provided for in Art 1(2) (b)-(f)), but the figure gives an overview of how the terms decisive for the first questions of applicability relate to one another.

The statements above are without controversy. However, the overlap between the terms public task and undertaking is more in dispute. The CJEU recently implicitly discussed this interface in the *Compass* case[47]. The *Compass* case concerned the legal issue of whether the refusal to supply doctrine, under the abuse of dominance rule, may be applicable when the Republic Österreich (Austria) refused to give access to the digitalised Austrian Company Register to the limited company Compass-Databank GmbH (Compass) so to enable it to sell access to or information provided in the Austrian Company Register.

Compass would have sold access to the company register to customers on the same or at least on a neighbouring "market" as the private agencies assigned by Austria to provide

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[44]For a very in-depth and excellent analysis of the interface between *the "PSI Directive"* (fn 4) in general, and the Compass case in specific, see Josef Drexl, 'The Competition Dimension of the European Regulation of Public Sector Information and the Concept of an Undertaking' in Vicente Bagnoli and Josef Drexl (eds), *State-Initiated Restraints of Competition* (Edward Elgar, Munich 2014) (forthcoming) Available at SSRN: http://ssrn.com/abstract=2397018, last visit 22 October 2014

[45]In accordance with Art. 106(2) TFEU, SGEI are exempted if the application of competition provisions on such conduct would obstruct the performance of the particular tasks assigned to the undertaking.

[46] However, Art. 11 (2) of the PSI Directive states that where an exclusive right is necessary for the provision of a service in the public interest might be permitted.

[47]Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich* [2012] not yet published, Opinion of AG Jääskinen. For further discussions regarding the Compass-case, please see Björn Lundqvist , ''Turning Government Data into Gold': The Interface between EU Competition Law and the Public Sector Information Directive – With some Comments on the Compass-Case' (September 19, 2012) International Review of Intellectual Property and Competition Law (IIC), (forthcoming) Available at SSRN: http://ssrn.com/abstract=2148949 or http://dx.doi.org/10.2139/ssrn.2148949. Last visited 20141015, last visit 22 October 2014

access to this register. The CJEU found that Compass would not be able to utilize the refusal to license of supply doctrine because Austria when making the Austrian Company Register available to the public was conducting an inseparable activity or service from the exercises of public power of collecting the data for the same register. Thus, Austria did not function as an undertaking under EU competition law.[48]

The Austrian court did not ask about the PSI Directive,[49] and the CJEU did not discuss the Directive in any length. CJEU stated that the PSI Directive in [the old] recital 9 states that the directive does not contain any obligation to authorise re-utilisation of documents. Moreover, the Austrian implementation of the PSI Directive explicitly exempted the Company register from its application.[50] AG Jääskinen stated that the PSI Directive maystill be used for inspiration and guidance.[51]

Both the statement by the CJEU and the AG's justification for not using the PSI Directive seem somewhat odd.[52] Indeed, it is unfortunate that the Austrian court did not explicitly ask about the application of the PSI Directive.[53]

Moreover, the CJEU in this case seems almost to have equated public task under the PSI Directive with non-economic activity under the notion of "undertaking" in competition law. According to CJEU, 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.[54] As a result, such an activity is not an economic activity. Equally, an activity consisting in the maintenance and making available to the public of the data thus collected, whether by a simple search or by means of the supply of print-outs, in accordance with the applicable national legislation, also does not constitute an economic activity, since the maintenance

[48] *Lundqvist* (fn 19)

[49] It seems like the court already had arrived to the conclusion that the Austrian PSI Act was not applicable. See Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich* [2012] not yet published, Opinion of AG Jääskinen, paras 21-22

[50]Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich*, [12 July 2012], not yet reported, para 50. See also Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich* [2012] not yet published, Opinion of AG Jääskinen, paras 21-22

[51] Implicitly Jääskinen found that the PSB in this case had produced, reproduced and disseminated through the agencies the information in order to fulfil its public task. Hence, the PSI regulation could not be applicable since the there was no re-use, only use of the Company register. Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich* [2012] not yet published, Opinion of AG Jääskinen, paras 36ff. See also *Lundqvist* (fn 19)

[52] As discussed by Lundqvist, it is true that the PSI Directive does not oblige the authorisation of re-use according to [the old] recital 9, but that can only be understood that the Member State or the relevant PSB has a prerogative under the directive to re-use or not to re-use the PSI. If it does not re-use PSI, there is no duty under the PSI Directive to re-use. Nonetheless, has the PSB indeed started to re-use the PSI, i.e. use it outside the original public task for what it was produced or supplied for, the PSB is, on the contrary, obliged under the PSI Directive to give access to the PSI. It is the only plausible interpretation of recital 9, Arts. 1, 10(2), and 11 of the PSI Directive. In other words, if the transfer of PSI to the agencies from the Austrian State in this case could be considered a re-use, the PSI Directive should have been applicable. Now, it may be questioned whether a Member State, in accordance with Compass may exempt certain PSI, e.g. the Company register, from the national PSI legislation altogether.

[53] It seems like the Austrian court already had arrived to the conclusion that the Austrian PSI Act was not applicable, see Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich* [2012] not yet published, Opinion of AG Jääskinen, paras 21 and 22. Nonetheless, the explicit Austrian exemption of the Company register from the national implementation of the PSI Directive seems questionable. *Lundqvist* (fn 19)

[54] *Drexl* (fn 16)

of a database containing such data and making that data available to the public are activities which cannot be separated from the activity of collection of the data.[55]

With regard to the fact that the making available to interested persons of the data in such a database is remunerated, the CJEU noted that, in conformity with the case-law, to the extent that the fees or payments due for the making available to the public of such information are not laid down directly or indirectly by the entity concerned but are provided for by law, the charging of such remuneration can be regarded as inseparable from that making available of data. Thus, the charging by Austria of fees or payments due for the making available to the public of that information cannot change the legal classification of that activity, meaning that it does not constitute an economic activity.

Several commentators find the outcome in Compass unfortunate. Firstly, it is unfortunate because thereby Competition law will not apply to a lot of the activities conducted by PSB, even though these activities presumably would affect competition on relevant markets.

Likewise the PSI regulation willperhaps not be applicable either given the definition of "public task".The definition of public task under the PSI Directive could be more narrow then "the public power and thereto connected conduct exemption" under *Compass* since the public tasks should under the PSI Directive at least be defined in the regulation to the PSB. However, since "public task" is the prerogative of the Member States in the PSI Directive, the Member States can, of course, increase the notion pf public task by including all sort of conducts in the regulation of the PSBs. The result of this would be that conducts that are both public tasks and economic activities would not be encompassed by either legal systems.

Secondly, it is moreover unfortunate because the activities conducted by PSBs which would be encompassed by competition law would probably also be addressed by the PSI Directive. A PSB acting in this area would seldom benefit from the application of either competition law or the PSI regulation, but when one is applicable the other would presumably also in many cases be applicable. Thus, the spheres in the graph above, representing public task (a PSI regulation term) and exercise of official authority and thereto connected activities (a competition law notion), respectively, would often cover the same forms of conduct.

RELEVANT CASE LAW

Introduction

Below, certain cases dealing with the interface between public tack and commercial activity, especially when PSB engages or enters established market, where PSI is traded, with free access to the PSI databases and discussed. The cases are reviewed to give

[55]Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich*, [12 July 2012], not yet reported, para 41ff

examples where the underlying principles under the PSI Directive and Competition law are perhaps not in congruence.

Dutch postal codes case[56]

The Dutch government has been working on a system of authentic datasets (the so called *basisregistraties*) for a number of years. One of these authentic datasets is the BAG, holding addresses and buildings (BasisregistratiesAdressen en Gebouwen). The data held in this registry were already available for re-use (including commercial use), except from the postcodes. From 1 February 2012 onwards, the postcodes will also be available for any type of use. PostNL, the holder of an postcode database, tried to prevent this in court, but the court decided that the postcodes should also be made available for re-use. This considerably increases the value of the BAG for re-use.

The authentic dataset of addresses and buildings (BAG) is maintained by the Dutch Cadastre. It holds the complete, updated and uniform list of addresses in the Netherlands, including the coordinates and information on the purpose, surface area and date of construction of the buildings. Every building and address has a unique identifier. The BAG is open for re-use by third parties, except for the postcodes. Decades ago, the system of the postcodes was set up by the PTT, the (at that time) state owned Postal Service. However, in the 1980s, this service was privatised and now the postcodes are held by a separate public company, PostNL. A Covenant between PostNL and the Dutch government determined that the postcodes could be provided by the government to third parties, but that the postcodes could not be used or disseminated for commercial purposes.

The policy of the Dutch government is that PSI should be made available in an easy and cheap manner to citizens and companies, whatever their intended use of the data might be. In order to include the BAG in this policy, the government proposed a change to the Covenant with PostNL in 2010, in order to allow the dissemination of the postcode database for commercial use. After refusing this change in April 2010, PostNL in December demanded an annual fee of 750.000 euro for the use of the postcode data within the BAG. The government did not accept this fee, and terminated the Covenant in January 2011 with a term of notice until 1 February 2012.

PostNL started a procedure before the court of The Hague, together with Cendris B.V., a private company licensed by PostNL to commercially re-use the postcode database.

[56] Case identifier: Koninklijke PostNL B.V. and Cendrid Data consulting B.V. v the State of the Netherlands (Ministry of Infrastructure and Environment), Date: 21 December 2011, Court decision: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BU9147 accessed 14 August 2014.

PostNL demanded the State to be disallowed to disseminate the postcodes in bulk to third parties via the BAG.

First, PostNL claimed that the government had infringed its database rights, but the court found no infringement, because the government showed that it obtained the postcodes from the local authorities (who get the postcodes from PostNL on the basis of the Covenant), and that it did not use the postcode database, so there was no extraction or re-utilization of the whole or of a substantial part of the database.

Second, PostNL contested the termination of the Covenant. According to PostNL, the government's termination of the Covenant was unlawful and it could not terminate the contract in order to evade the prohibition of dissemination for commercial use. The Court stated that the government merely used the possibility for termination foreseen in the Covenant, and had tried to find other solutions, so there was no unlawful termination. However, the Court did find that by already making available the postcodes for commercial use to a software developer before the Covenant had officially ended, the government violated the covenant and should compensate PostNL for its damage.

Third, the Court had to consider whether the government competed unfairly and acted irresponsibly by making the postcode data from the BAG available to third parties. The Court found that there was no unfair competition, because the government acted in accordance with the law on the BAG, with the principles of the PSI directive, and with the principles of the new legislation on market activities of the state (which had not entered into force yet). In addition, the government had given PostNL sufficient notice of its intentions and PostNL's interests were sufficiently protected by the notice period foreseen in the Covenant. Therefore, there was no reason for the government to find the objective of making the data available disproportionate to the negative consequences this would cause.

The government seem to have utilized statutory basis to access the postcode database, while thereafter also entering the market where PostNL was active by giving access to the same PSI bundled with other information under the BAG database for free, on the wholesale and end-user market.

Falkplan case[57]

Introduction

In a summary proceedings, the Dutch Court of 's Hertogenbosch refused to impose

[57] Court decision: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BU8010&u_ljn=BU8010> accessed 22 October 2014

Falkplan's request for an injunction on the Ministry of Infrastructure and Environment to refrain from making available the national road database for re-use without any conditions, including for commercial purposes. Falkplan, a private company providing route planning and travel information services, claimed that the making available by the Ministry of the road database for re-use would cause irreparable damage to its business model. However, the Court found no sufficiently urgent need to immediately stop the Ministry from disseminating the data. Interestingly, although the Court could have rejected Falkplan's claims on these grounds without any further discussion on the merit of the case, it nevertheless went on to address Falkplan's arguments and found that the Ministries' intentions were fully in line with its obligations under the re-use framework and the (upcoming) changes in the Dutch competition law. Hence, the national road database can be used for any commercial or non-commercial purpose without any restrictions. However, the story is not over yet: in spite of the manifestly clear decision in the summary proceedings, Falkplan has initiated so called 'ground proceedings', which may take up to one year before a decision is rendered (with the possibility of appeal).

Summary

In December 2011, in a summary proceedings, the Court of 's Hertogenbosch ruled negatively on the request of Falkplan to restrict the Ministry of Infrastructure and Environment from making the national road database freely available for re-use. This ruling is part of a long dispute between both parties on the possibility for commercial re-use of the national road database. Back in 2006, the Ministry already decided to make this database freely available on the Internet for access and re-use. However, after considerable protest by some private sector mapping companies, an independent commission installed by the Ministry examined the possible impact on the market of releasing the data. This Commission found that there was a public interest that justified opening up the data, based on the national programme for authentic databases and the INSPIRE requirements to make spatial data available (CommissieTweedeConsultatierondeVrijgeven NWB Bestand 2006). Nevertheless, due to heavy protest of the private sector, the Ministry decided to postpone making the data available for commercial use until 2009, which was later extended to 2011, and only allowed non-commercial use since 2007. This grace period was intended to serve as a transition period for the private sector parties, allowing them to adapt their business model to the new circumstances.

In November 2011, the Ministry decided to make the road database freely available, including for commercial re-use. Falkplan responded by means of a request for a staying order from the Court of 's Hertogenbosch, aiming to prevent the release of the data by the Ministry. The Court refused to impose such a staying order, stating that Falkplan did not show sufficient urgency for an injunction to be granted (under Dutch law, such urgency is a prerequisite for admissibility of parties to summary proceedings). In this context, the Court considered that Falkplan did not provide sufficient evidence of the damage it would incur if commercial re-use of the national road database would be allowed. The mere fact that Falkplan's financial interests were at stake, did not justify an injunction. Secondly, the Court found that Falkplan also failed to show that its existence is endangered by the release of the road database. Falkplan's argument that it had actually calculated the possible losses, but could not release this confidential

information because it would harm its position towards its competitors, did not convince the Court. Thirdly, according to the Court, Falkplan also did not have an immediate need for a staying order, because no competitor would be able to offer any competing product within a short term, as the road database would still have to be enriched with many other types of information.

Although the Court could have stopped here, it nevertheless continued by stating that, in case of such lack of urgency, a staying order could only be granted if manifest doubts about the legitimacy of the actions of the Ministry were already clear without any in depth investigation and that in any procedure on the merit of the case the Ministry would also be held in the wrong. The Court did not find such manifest doubts, for two main reasons. First, the data held in the road database were collected by the Ministry as part of its public task, and making available the database is part of the Ministry's obligation under the Dutch Freedom of Information Act, which also transposed the PSI directive. Secondly, it referred to the future amendments to the Dutch Competition Act relating to the market activities of the State (and requiring those activities to be charged at full cost), which holds an exception for providing data collected in the course of the public body's public task, essentially allowing public sector bodies to facilitate free commercial re-use of such data.

While there will be a full court procedure on the merit of the case in the future, the Court's refusal to grant a staying order to Falkplan entails that the national road database can be made freely available for any re-use, including for commercial purposes.

Three Swedish Competition Authority cases

In three Swedish decisions, the Competition Authority had the opportunity to scrutinize whether PSBs were acting anticompetitive when launching either free searchable databases on their websites, or where the prices on the wholesale level were set to an alleged anticompetitive level compared to the price of access on the end-user market.

Swedish Patent and Registration Office[58]

In March 2012, the SCA decided in reference to the Trademark register that no further investigation would be made with regard to a possible abuse of a dominant position. The case concerned the fact that the Swedish Patent and Registration Office (SPRO) from 2010 started to offer free access to the Trademark register to the downstream end-user market, whereas customers on the upstream wholesale market are offered more detailed data in different formats (so-called "register lifted data") for a one-time fee and then a yearly fee.

Before 2010, SPRO had offered access to the database to end-users for a fee, and SPRO motivated the decision to eliminate the fee with that free access was within the public task assigned to it by the government. The complaining (incumbent) re-userpurported

[58]Dnr 470/2011. http://www.kkv.se/beslut/11-0470.pdf. Accesed 29 May 2014

that it waslikely it will be squeezed out of the market by SPRO offering a competing product for free.

While the SCA was initiating its investigation, the SPRO announced that it would lower its fees in the wholesale segment in 2013, and the SCA in its decision accepted the lowered fees as reasonable (they would come to corresponded to the marginal costs) and thereby, without dwelling further into the matter, the SCA found that no abuse of dominance was at hand. The SCA concluded, without discussing the requirements, that the SPRO is an undertaking in accordance with the Swedish Competition Act[59].

The Swedish Meteorological and Hydrological Institute[60]

The SCA investigated whether the Swedish Meteorological and Hydrological Institute (SMHI) was in breach of the Swedish Competition Act in a situation similar to the SPRO case above. When SMHI decided to eliminate parts of it fees on the wholesale level and only charge a fee covering the marginal cost of the delivery of large, or cumbersome to collect, data-sets, the SCA closed the investigation. The outcome implied that access, at least on the end-user market, would be granted without any charges.

The Swedish Land Registry[61]

In another case, from November 2012, the SCA assessed the way the Cadastre sells refined information in the land register to commercial private actors. The complaining re-user purported that the Cadastre was not giving access to raw data. Instead, the re-user only got access to refined data, implying that the price was too high, especially in comparison to the fees charged in the end-user market. The SCA did not find any abuse.

The case was decided only weeks after the *Compass* case, which seems to be the reason why the SCA is not as clear on the issue whether or not the PSB should be considered an undertaking (SCA's "preliminary" assessment wasthat the information supply division of the Cadastre should be considered an undertaking).

In these cases, the SCA and the PSBs actually seem to have taken for granted that the transfer of data to re-users for remuneration in the wholesale market implied that the PSBs were conducting an economic activity and should, thus, be considered undertakings under competition law. Only in the last case, decided only weeks after *Compass*, did the SCA start to back-track and relied on the fact that the Swedish Land Registry admitted to the fact that it should be considered an undertaking under Competition law before finding the Registry not abusing its dominant position.

The Swedish PSBs subject to the assessment, referred to the PSI Act in their argumentation. Both the SPRO and the Cadastre seem to have argued upon the assumption that the SCA would at least in some way consider the PSI Act. They argue that their service to supply more detailed information to the upstream markets was a public task, while also the supply for free or to a lesser fee on the end-user market also fell within their public task. Their argumentation indicates that they were possibly

[59] SFS 2008:579. (Swe: *Konkurrenslagen*)
[60] Dnr 800/2011, http://www.kkv.se/beslut/11-0800.pdf. Accesed 29 May 2014
[61] Dnr. 601/2011. http://www.kkv.se/beslut/11-0601.pdf. Accesed 29 May 2014

concerned that the SCA might indicatethat they are re-using their own PSI for commercial purposes, and treating their own commercial branch more favourably than other stakeholders (an Art. 10 (2) situation).

United Kingdom case

The Dutch and the Swedish cases above concern the PSBs giving access to PSI without charges or to less than or no margin compared to the prices at the wholesale level, and thereby frustrated the re-users business models. They argue that by opening up their PSI these governments are conducting unfair competition practices, or at least inflicting damage. The PSBs claimed that giving access for free in the end-market or the wholesale market (or both) is within their public task, and also in line with the spirit of the PSI directive of charging at most marginal cost for accessing the PSI. Stating this there are however other cases were the PSBs are alleged to make use of their prerogative of defining public task so not to give access to PSI, or at least not in the manner, i.e. raw data, requested by the re-users. The Swedish Cadastre case discussed above is one example, another example is the UK Coal Authority Case.

UK Coal Authority Case[62]

The case relates to a dispute between PinPoint Information Ltd. (PinPoint) and the Coal Authority on the permitted re-use of the Coal Authority's information on coal mining information. The Coal Authority systematically collects and maintains certain data on past and ongoing coal mining operations. This information is used (among other purposes) in the course of conveyancing: when selling property, information from the Coal Authority is requested in England and Wales though standardized forms (so-called CON29M forms). The reports provided by the Coal Authority in response to these requests (CON29M reports) are then used to determine any risks to the property caused by coal mining activity. Thus, the information is commercially valuable in the course of real estate transactions. Granting access to this PSI is one of the statutory tasks of the Coal Authority.

A number of commercial companies have implemented arrangements with the Coal Authority, under which it supplies CON29M reports for specific properties upon request (for a fee). The commercial companies then use this information to enrich their own data, and sell the results. PinPoint is one such company, which specializes in the commercialization of official geospatial data. PinPoint however sought a more extensive arrangement, seeking to license the entirety of the Coal Authority's databases, rather than obtaining specific information through individual requests on a case-by-case basis. It submitted a request to this effect to the Coal Authority in August 2010. After some discussions PinPoint proposed the establishment of a joint venture with the Coal

[62] See more at: Hans Graux, 'OPSI's ruling on the PinPoint Information' [2011] <http://www.epsiplatform.eu/content/opsi-s-ruling-pinpoint-information#sthash.D0KcM7RL.dpuf> accessed 22 October 2014

Authority, rather than making a simple request for re-use, as a method for implementing this data sharing plan; however, the Coal Authority declined the offer. A formal complaint was made to the Coal Authority and having received the Coal Authority's response to that complaint, PinPoint requested mediation through OPSI. The Coal Authority declined the request PinPoint then submitted a formal complaint to OPSI.

The complaint related both to the Coal Authority's rejection of the joint venture proposal, and to the failure to grant a licence to re-use the databases as proposed by PinPoint, which PinPoint argues was in violation of the Re-use of Public Sector Information Regulations 2005 (the PSI Regulations).

However, OPSI noted that re-use by definition requires that information is used for a different purpose than the initial purpose within the public task for which the document was produced. Noting that the production of CON29M reports is a part of the Coal Authority's public task, OPSI found that the production of similar reports by private companies is not a form of re-use but rather a replication of existing public tasks, and that the relevant parts of the PSI Regulations therefore did not apply. As PinPoint declined to clarify any further plans for the information (which might have gone beyond the production of CON29M equivalent reports, and thus might have constituted re-use covered by the PSI Regulations), OPSI found that the request for re-use did not "state the purpose for which the document is to be re-used", as required under the Regulations.

Ultimately, OPSI decided to partially uphold the complaint. While the complaint could not formally be based on the PSI Regulations due to the fact that PinPoint did not specify any clear intended re-use, OPSI none the less found several deficiencies in the Coal Authority's treatment of the communications. As a result, OPSI recommended that the Coal Authority review its communication to the public, to potential re-users and to OPSI, and that it re-examine the original request.

It is apparent from OPSI's initial complaint findings, that TCA felt its public task was to include not just the creation and maintenance of coal risk public records, but also the sale of CON29M coal reports. PinPoint challenged the basis of OPSI's findings and threatened to escalate matters. Despite the case not being resolved, its investigation by OPSI has resulted in notable changes to TCA practice in that more TCA data has been released and TCA has published a statement of its public task.

Analysis

The national cases reviewed above are examples of incidents where the Member States prerogative to decide what constitutes public task may have restricting effects on the business activities of the re-users. In the Dutch cases and Swedish Trademark database case, giving access for free and stating that this is within the public task and even promoted under the pricing rules and principles of the PSI directive both limit the business activities of the re-users and encourage them to develop their services. It forces

them either to extend and diversify their products so not be seen to be in competition with the service provided for free by the PSBs, or to exit the markets.

In fact the cases above have some differences and similarities. The Dutch PostNL case concerns a PSB entering new markets, with the aim of increasing its public tasks in accordance with the national government instructions, by opening up for transferring PSI without charges both in the wholesale and end-users segments. Here the incumbent firm, and the holder of the PSI database, was exposed the competitive pressure from a new entrant being the PSB. The Swedish Trademark case and the Dutch Falkplan case dealt with PSBs starting to give access for free and for commercial re-use, while previously it either charged also end-users or refused giving access for commercial re-use. The PSBs purported that their reason for changing terms of accessing the PSI was to increase availability of PSI under their public tasks, in accordance with the PSI Directive. The UK CAT case is an example of a PSB alleged to have extended the notion public task so to exclude re-users not by giving access but by refusing re-use al together.

Interestingly, the Swedish re-users in the cases above complained to the SCA regarding the pricing levels of the PSBs under competition law and the abuse of dominance prohibition in an effort to try to limit the impact of the strategies by the PSBs. The SCA relied, and the PSB agreed, that in principle the prohibition of abuse of dominance would have be applicable for the PSBs, save that they had not committed any abuse.

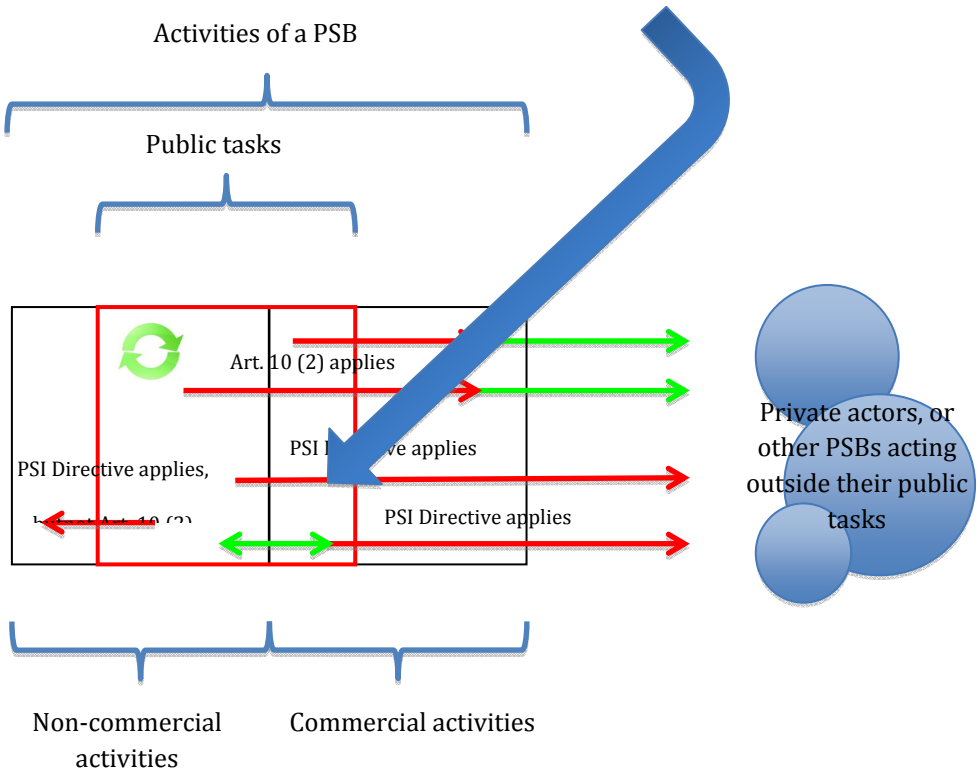
The application of competition law to these cases would also have been beneficial since thereby the PSI directive and the notion of "public task" did not have to be addressed. Competition law could be utilized irrespectively on what the PSBs would be considered to be their public tasks. However, when the last decision was to be handed down by the SCA, the CJEU delivered the Compass case, which seems to restrict the use of competition law when dealing with PSBs and the re-use of PSI. In fact, it seems that the CJEU limits the use of competition law so not to include bodies conducting certain public tasks in reference of collecting and disseminating PSI. The CJEU extended exemption (under the notion of undertaking) for conducts that fall under the 'public power and thereto connected activities' doctrine. It did include also the transfer of PSI between the Austrian state to the agencies, and, perhaps, generally, to the transfer of PSI for re-use if that is within the statutory duties of the PSB.

According to CJEU, data collection activity in relation to undertakings, on the basis of a statutory obligation on those undertakings to disclose the data and powers of enforcementrelated thereto, falls within the exercise of public powers.[63] As a result, such an activity is not an economic activity. Equally, an activity consisting in the maintenance and making available tothe public of the data thus collected, whether by a simple search

[63]On this point see *Drexl* (fn 16)

or by means of the supply ofprint-outs, in accordance with the applicable national legislation, also does not constitute aneconomic activity, since the maintenance of a database containing such data and making thatdata available to the public are activities which cannot be separated from the activity of collection of the data.[64]

With regard to the fact that the making available to interested persons of the data in such a database is remunerated, the CJEU noted that, in conformity with the case-law, to the extentthat the fees or payments due for the making available to the public of such information arenot laid down directly or indirectly by the entity concerned but are provided for by law, thecharging of such remuneration can be regarded as inseparable from that making available ofdata. Thus, the charging by Austria of fees or payments due for the making available to thepublic of that information cannot change the legal classification of that activity, meaning that it does not constitute an economic activity.[65] It seems that the CJEU thereby address the area of public commercial tasks, and finds that competition law not applicable to such conduct.



In light of the *Compass* case, the national cases reviewed above should perhaps not have been scrutinized under Competition law. The PSBs in those cases all claimed to be active with public tasks in reference with collecting and disseminating PSI under statutory duty. While some of them clearly also are performing public tasks, other forms conduct seem to be both commercial and public tasks. Thus, the Post NL case, where the PSB enters an already existing re-user market by providing PSI for free, seems to imply that anticompetitive exclusionary effects may materialise, while the same conduct also opens

[64] Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich*, [12 July 2012], not yet reported, para 41.
[65] Case C-138/11 *Compass-databank GmbH v. RepublikÖsterreich*, [12 July 2012], not yet reported, para 42.

up for more re-users to access the PSI and enter downstream markets. There is also the inherent difficulty that the PSBs are giving access for free on already established markets. It creates a strain between competition law principles and that the new PSI Directive actually stipulates that the PSBs as a general rule should price below market price.

POLICY SUGGESTIONS

Our policy suggestion is based on the finding that we believe that the interface between competition law and PSI directive needs to be clarified. At least, it is not evident when competition law is applicable to PSBs that have as their public task to commercially distribute PSI.

The Commission could try to give guidance on this point in the PSI Licensing Guidelines. However, that may be difficult. An alternative could be that the Commission and, foremost, national competition (or, when applicable PSI) authorities are encouraged to shed some light on the interface by investigating and even litigating such conduct that may be identified as public commercial tasks in the area of PSI. In fact, national competition or PSI authorities could be better placed to do this, while they also could, possibly, scrutinize the important issue of identifying "public tasks". Identifying whether a certain conduct constitutes a "public task" should be done in accordance with the Member States' existing forms of governance and procedure,[66] and national authorities seem more apt to scrutinize this issue. Similarly, since the Compass case makes a connection between Member States' legislation and the "state action" exemption under the notion of undertaking, possibly national authorities are better placed to investigate and litigate whether the conduct scrutinized fall under the 'public power and thereto connected activities' doctrine, or whether competition law is applicable.

[66] Cf *Jansen* (fn1) 12-13