MARKET AND COMPETITION LAW REVIEW

M&CLR

VOLUME VII / No. 2
October 2023

UCP PRESS

Market and Competition Law Review / VOLUME VII / No. 2 / OCTOBER 2023

Recalibrating the Compass: Towards Effective Competition Law Enforcement on Mixed Markets*

*Jasper P. Sluijs***

ABSTRACT: The undertaking, a cornerstone of EU competition law, has consistently been approached as a functional concept. Any entity engaged in economic activity should be considered an undertaking, thereby ensuring consistent application of competition law across competitors. However, current national enforcement practice reveals a departure from the functional approach to the undertaking on mixed markets, where public and private firms compete. Particularly, allegedly anticompetitive behaviour by public entities has evaded competition law scrutiny in the Netherlands, because competition law was found not to apply to these public entities. Drawing on a jointly interpreted string of CJEU cases in competition law and state aid law – which this article coins as the "Compass doctrine" – the Dutch competition authority and courts found that economic activity by public entities is exempt from competition law when connected to the exercise of public power. Analysis of the Compass doctrine cases reveals how a number of case-specific outcomes taken together have allowed for an undermining of the functional approach to the undertaking. It is demonstrated how the sum of the Compass doctrine is larger than its individual parts, which SEEMS to have been unforeseen by the CJEU. This article demonstrates how the Compass doctrine has two adverse consequences: (1) because it undermines the functional approach to the undertaking as the subject of competition law, it impedes effective enforcement; (2) the Compass doctrine enables public firms to behave anticompetitively on mixed

* Date of Reception: 30 June 2023. Date of Acceptance: 23 July 2023.
DOI: https://doi.org/10.34632/mclawreview.2023.15888.

** Assistant Professor Utrecht University School of Law, Newtonlaan 201, 3584 BH Utrecht, the Netherlands. The author acknowledges Anna Hatzius-Sarramona and Marleen Kappé for diligent research assistance, participants of the ASCOLA Annual Conference for valuable comments and Or Brook for critically reviewing drafts. All mistakes and omissions remain the author's. Following the ASCOLA Transparency and Disclosure Declaration, the author has nothing to disclose. j.sluijs@uu.nl. ORCID: 0000-0002-3822-0899.

markets. The CJEU never anticipated the advent of commercial behaviour by public entities, who with the Compass doctrine in hand can infringe competition law with impunity. Experiences in the Netherlands to this effect should be regarded as a canary in the coal mine for mixed markets across the EU. Therefore, it is incumbent on the CJEU to revisit the Compass doctrine in future cases, which may follow from preliminary references. This article recommends the CJEU to (re)emphasize that once an entity is engaged in economic activity, it can no longer escape competition law scrutiny by being connected to the exercise of public authority. To protect the level playing field on mixed markets, all economic activity should explicitly be subject to EU competition law.

KEYWORDS: mixed markets, notion of the undertaking, economic activity, exercise of public authority

I. Introduction

When teaching competition law, lecturers typically explain to students how EU competition law applies to undertakings, that an undertaking is any entity engaged in economic activity, and that economic activity concerns offering goods and services on a given market.[1] The definition of economic activity is "remarkably broad" with well-defined exceptions,[2] based on a "trite" case law.[3] The so-called 'functional approach', focused on the *activity* of undertakings, is widely accepted in both the case law[4] and academic commentary:[5] an undertaking is defined by what it *does* rather than what it *is*. Consequently, entities cannot escape competition law scrutiny

[1] See, e.g., Alison Jones, Brenda Sufrin, and Niamh Dunne, *EU competition law: Text, cases, and materials*, Seventh Edition, Text, Cases, and Materials (Oxford, New York: Oxford University Press, 2019), 141.

[2] Niamh Dunne, "Public interest and EU competition law", *The Antitrust Bulletin* 65, no. 2 (2020): 262.

[3] Alison Jones, "The boundaries of an undertaking in EU competition law", *European Competition Journal* 8, no. 2 (2012): 302.

[4] Judgement of 23 April 1991, *Höfner and Elser v. Macrotron* GmbH, C-41/90, ECLI:EU:C:1991:161; Judgement of 17 February 1993, *Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon (Poucet and Pistre)*, C-159/91, ECLI:EU:C:1993:63; Judgement of 12 September 2000, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, ECLI:EU:C:2000:428; Judgement of 19 February 2002, *Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, ECLI:EU:C:2002:98.

[5] See, e.g., Ben Van Rompuy, "The role of EU competition law in tackling abuse of regulatory power by sports associations", *Maastricht Journal of European and Comparative Law* 22, no. 2 (2015):

premised on their legal status or business model,[6] and harmonization of the subject of competition law across the EU is ensured.[7]

However, in the absence of a formal definition of the undertaking in the EU Treaties and given the many instances in which competition authorities and courts utilize the notion, the parameters of the undertaking, including its functional interpretation, require continued attention. Indeed, "the doctrine thus needs to be realistically and carefully confined" to ensure that anticompetitive behaviour can continue to be enforced and tried under EU competition law.[8]

The present article introduces, chronicles, and critically assesses the *Compass* doctrine: a string of cases that covers one of the exceptions to the functional approach to the undertaking, namely the exclusion of economic activity tied to the exercise of public authority. Although the main cases underlying this doctrine – *Selex* (ECJ), *Compass Datenbank* and *TenderNed* – are often referred to in commentary,[9] this article argues that the mechanics and combined impact of the doctrine as a whole have not been fully appreciated and internalized in competition law scholarship.

Moreover, enforcement practice, particularly in the Netherlands, demonstrates how the *Compass* doctrine leads to consequences apparently unforeseen by the CJEU. First, the *Compass* doctrine undermines the functional approach to the notion of undertaking and thereby hinders effective enforcement. Second, the *Compass* doctrine is problematic on mixed markets, where public and private firms compete. In these markets, particularly when it concerns monetized public sector information (PSI) data, public entities may be incentivized to behave anticompetitively and do so with impunity with the *Compass* doctrine in hand.

These two consequences follow from a doctrine that as a whole transcends the simple sum of its separate cases. It is therefore that, after an introduction to the undertaking in competition law, the *Compass* doctrine is positioned by means of an exhaustive case law analysis spanning EU

179-208; Okeoghene Odudu, "The meaning of undertaking within 81 EC", *Cambridge Yearbook of European Legal Studies* 7 (2005): 211-241.

[6] Florence Thépot, *The interaction between competition law and corporate governance: Opening the "black box"* (Cambridge University Press, 2019), 34-38.

[7] Wolf Sauter, *Coherence in EU competition law* (Oxford University Press, 2016), 75-81.

[8] Jones, "The boundaries of an undertaking in EU competition law", 303.

[9] See, e.g., Ariel Ezrachi, *EU competition law: An analytical guide to the leading cases* (Oxford, United Kingdom: 2021), 5-20; Marcos Araujo Boyd, "The notion of undertaking in EU Competition Law" (PhD diss., University of Glasgow, 2023), 146-151, https://theses.gla.ac.uk/83415/.

competition law and state aid law from the 1980s onwards. The following chapter, then, explains the main outcome of the *Compass* doctrine and the negative consequences thereof for effective enforcement and competition on mixed markets. Given these negative consequences, the concluding chapter argues that the CJEU should take the opportunity to revisit the *Compass* doctrine in a preliminary ruling and suggests how the doctrine could be revised to prevent the identified adverse effects.

II. The undertaking and the exercise of public authority: Establishing the Compass *doctrine*

The substantive core of EU competition law, articles 101, 102 and 106(2) TFEU, focuses on anticompetitive behaviour by undertakings. The undertaking as a concept, however, is not defined anywhere in the Treaties and was thus left to the courts to outline.[10] As has been applied consistently by the CJEU, an undertaking concerns any entity engaged in economic activity,[11] irrespective of its legal status or the way in which it is financed.[12] 'Economic activity', then, designates the sale of goods or services on a market.[13] Taken together, economic activity becomes a sufficient condition for the notion of the undertaking under EU competition law.

The CJEU has thus developed a functional approach to defining the undertaking, which has allowed for somewhat of a 'duck test'[14] that focuses on what an undertaking *does* rather than what it *is*: "Provided that an activity is of an economic character, those engaged in it will be subject to

---

[10] Judgement of 8 July 2008, *AC-Treuhand AG v. Commission*, T-99/04, ECLI:EU:T:2008:256, paragraph 144; For an exhaustive (and impressive) analysis of how the CJEU has iteratively defined the notion of the undertaking, see Araujo Boyd, "The notion of undertaking in EU competition law".

[11] Judgement of 23 April 1991, *Höfner and Elser v. Macrotron GmbH*, C-41/90, ECLI:EU:C:1991:161; Judgement of 17 February 1993, *Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon (Poucet and Pistre)*, C-159/91, ECLI:EU:C:1993:63.

[12] Judgement of 12 September 2000, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, ECLI:EU:C:2000:428; Judgement of 19 February 2002, *Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, ECLI:EU:C:2002:98.

[13] Judgement of 18 June 1998, *Commission v. Italy*, C-35/96, ECLI:EU:C:1998:303.

[14] While the origins of the duck test are unclear, it was popularized as an abductive test by Richard Cunningham Patterson Jr., United States ambassador to Guatemala in 1950, to distinguish whether someone was a communist: "[If a] bird certainly looks like a duck. Also, he goes to the pond and you notice he swims like a duck. Well, by this time you've probably reached the conclusion that the bird is a duck, whether he's wearing a label or not". See Bruce W. Jentleson, "Beware the duck test", *The Washington Quarterly* 34, no. 3 (2011): 137.

Community competition law".[15] Consequently, individuals,[16] professional organizations,[17] medical service providers,[18] trade groups,[19] state-owned entities[20] and cooperatives[21] – to mention only a few examples – have been regarded as undertakings under competition law. The rationale behind this functional approach lies in facilitating equal enforcement opportunity for all entities active on markets and harmonizing the ambit of competition law across member states.[22]

The concept of undertaking is therefore generally explained to competition law students as a broad and inclusive concept,[23] with non-economic activity limited to only specific instances.[24] EU competition law textbooks typically list three exclusions of this broad interpretation of the undertaking social protection on the basis of solidarity,[25] public procurement,[26] and activities connected to the exercise of public authority. This latter category will be the focus of the present research. How have activities connected to the exercise of public authority been established as excluded from the ambit of competition law in the case law?

As defining the notion of the undertaking has been subject to the CJEU, the status of undertakings in relation to the exercise of public authority has also mainly been developed in a case-by-case fashion. In short, the current outcome of this case law is that activities that are inseparably connected to

---

[15] Judgement of 16 March 2004, *AOK Bundesverband*, C-264/01, C-306/01, C-354/01 and C-355/01, Opinion of Advocate General Jacobs (22 May 2003) ECLI:EU:C:2003:304, paragraph 25.

[16] Judgement of 18 December 2008, *Coop de France Bétail et Viande et al. v. Commission*, C-101/07 P and C-110/07 P, ECLI:EU:C:2008:741.

[17] Judgement of 19 February 2002, *Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, ECLI:EU:C:2002:98.

[18] Judgement of 25 Oktober 2001, *Firma Ambulanz Glöckner v. Landkreis Südwestpfal*, C-475/99, ECLI:EU:C:2001:577.

[19] Judgement of 8 November 1983, *NV IAZ International Belgium and others v. Commission*, 96-102, 104, 105, 108 and 110/82, ECLI:EU:C:1983:310.

[20] Judgement of 30 April 1974, *Giuseppe Sacchi*, 155/73, ECLI:EU:C:1974:40.

[21] Judgement of 15 December 1994, *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, C-250/92, ECLI:EU:C:1994:413.

[22] Or Brook, *Non-competition interests in EU antitrust law: An empirical study of Article 101 TFEU*, Global Competition Law and Economics Policy (Cambridge: Cambridge University Press, 2022), 251-254, https://doi.org/10.1017/9781108946674.

[23] Sandra Marco Colino, *Competition law of the EU and UK* (Oxford University Press, 2019), 28.

[24] Richard Whish and David Bailey, *Competition law* (Oxford University Press, 2018), 87.

[25] See, e.g., Judgement of 16 March 2004, *AOK Bundesverband*, C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150.

[26] See, e.g. Judgement of 4 March 2003, *FENIN v. Commission*, T-319/99, ECLI:EU:T:2003:50.

the exercise of public authority are not economic activities of an undertaking, and thus fall outside the scope of competition law. The incremental development of this outcome has neither been analysed extensively in the literature on the undertaking in competition law,[27] nor has the full implication of this outcome been fully appreciated in the literature on non-economic activities in competition law.[28] Furthermore, because this case law bridges competition law and state aid law, very few authors[29] have offered an integrated analysis of these cases across both disciplines. An exhaustive analysis of this case law is therefore appropriate.

A. The early case law: from Commission v. Germany to MOTOE

The groundwork for the *Compass* doctrine lies in two 1980s cases. First, the Commission had brought infringement proceedings against Germany for tax-exempting transportation services for the German postal service. The ECJ scrutinized whether transportation services on behalf of the tax-exempt public postal service could be considered separate from the *Bundespost* itself – and thus whether they were taxable.[30] The Court found that within a public authority such as the postal service, it is possible to distinguish between activities in the public interest and outside the public interest. Only those activities in the public interest could be tax-exempt.[31] Even though no reference is made to economic activity or even competition law, this case is often referred to when explaining how activities within the exercise of public authority do not constitute economic activity.[32]

Second, in a 1987 infringement procedure the Commission held that Italy had not fulfilled its obligations under a directive mandating transparent

---

[27] For instance, Lianos et al. (2019) only discuss parts of the case law on the "public authority exception", omitting consequential cases such as *Selex* (ECJ) and *Compass Datenbank*, see Ioannis Lianos, Valentine Korah, and Paolo Siciliani, *Competition law: Analysis, cases, & materials* (Oxford, New York: Oxford University Press, 2019), 290-295.

[28] Erik Kloosterhuis, "Defining non-economic activities in competition law", *European Competition Journal* 13, no. 1 (2017): 117-149; Lei Zhu, "SGI: An EU expression of State functions", in *Services of general economic interest in EU competition law: Striking a balance between non-economic values and market competition*, Legal Issues of Services of General Interest (The Hague: T.M.C. Asser Press, 2020), 27-59.

[29] Araujo Boyd, "The notion of undertaking in EU competition law", 146-151.

[30] Judgement of 11 July 1985, *Commission v Germany*, 107/84, ECLI:EU:C:1985:332, paragraph 11-12.

[31] *Id*., paragraphs 14-18.

[32] See *Aeroports de Paris* (GC), *infra* note 51; *MOTOE*, *infra* note 52; *Selex*, *infra* note 55; *Compass Datenbank*, *infra* note 62.

financial relations between public undertakings and Member States[33] by not disclosing information about its state tobacco monopoly. Italy's refusal was premised on the tobacco monopoly not being a separate legal entity from the state, and therefore supposedly not a public undertaking.[34] The ECJ held, however, that a public undertaking needn't be a separate legal entity from the state to be considered as such.[35] Similar to the international law distinction between *jure imperii* and *jure gestionis*,[36] bodies of state can both be involved in public *and* economic activities, according to the ECJ.[37]

Both these infringement procedures would be relied on frequently by the CJEU in later cases scrutinizing economic activity related to the exercising of public authority. The first case in which the ECJ dealt with this matter, however, it relied on its own reasoning without reference to the above infringement procedures. This concerns *SAT Fluggesellschaft* (also referred to as *Eurocontrol I*), a preliminary reference from a Belgian Court, in which the ECJ considered whether route charges by the public air traffic controller Eurocontrol could be deemed anticompetitive under the joint application of arts. 106 and 102 TFEU.[38] In order to be anticompetitive under EU competition law, route charges would need to be considered economic activity. The Court reiterated the public authority status of Eurocontrol,[39] and argued that route charges cannot be separated from its public authority activities.[40] It then concluded that while an undertaking under EU competition law is engaged in economic activity "regardless of the legal

---

[33] Currently Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ 2006 L 318/17.

[34] Judgement of 16 June 1987, *Commission v. Italy*, C-118/85, ECLI:EU:C:1987:283, paragraph 9.

[35] *Id*., paragraphs 10 ff.

[36] Jasper P. Sluijs, "Commercial divisions of public entities and the limits of EU competition law", *European Competition and Regulatory Law Review* 3, no. 3 (2019): 268.

[37] This principle will be applied by the courts in a number of subsequent cases: *Diego Cali, infra* note 43; *Aéroport de Paris*, *infra* note 51; *MOTOE*, *infra* note 52; *Selex*, *infra* note 58; *Compass Datenbank*, *infra* note 62.

[38] Judgement of 19 January 1994, *SAT Fluggesellschaft mbH v. Eurocontrol*, C-364/92, ECLI:EU:C:1994.

[39] The public authority status of Eurocontrol was firmly established in a number of cases, see Case 29/76 *LTU v. Eurocontrol* ECR 1541 (1976); Joined Cases 9/77 and 10/77 *Bavaria Fluggesellschaft and Germanair v. Eurocontrol* ECR 1517 (1977).

[40] Judgement of 19 January 1994, *SAT Fluggesellschaft mbH v. Eurocontrol*, C-364/92, ECLI:EU:C:1994, paragraphs 27 ff.

status of the entity and the way in which it is financed",[41] Eurocontrol's activities as a whole are those of a public authority and "not of an economic nature justifying the application of [EU competition law]".[42]

It seems, therefore, that the ECJ broke new ground in *SAT Fluggesellschaft* by independently concluding that activities within the exercise of public authority cannot be regarded as economic activity under EU competition law. In subsequent cases the CJEU would substantiate this finding retroactively.

First, in *Diego Cali*, a preliminary reference from Italy with a related set of facts regarding environmental protection charges by a public port authority, the ECJ re-iterated and affirmed its reasoning of *SAT Fluggesellschaft*.[43] The court however amended the reasoning of *SAT* by applying the distinction between a state's public and economic activities of the aforementioned *Commission v. Italy*,[44] thereby leaving the option open that a public authority could in principle be involved in economic activity inasmuch as those activities fall outside of its exercise of public authority.[45] Whether or not the activity falls within the scope of exercising of public authority is determined by "its nature, its aim and the rules to which it is subject".[46]

The opening for economic activity outside of the exercise of public authority that the ECJ created in *Diego Cali* was applied in the subsequent *Aéroports the Paris* cases. These cases followed from a discriminatory pricing complaint by an airline caterer against the (public) authority that functioned both as an aviation supervisory agency and operator of the Paris region airports. In reviewing the Commission's Decision, the GC for the first time applied the above-mentioned *Bundespost* taxation judgement,[47] indicating that only activities that can be "severed from those in which

---

[41] Citing the landmark cases Judgement of 23 April 1991, *Höfner and Elser v. Macrotron GmbH*, C-41/90, ECLI:EU:C:1991:161; and Judgement of 17 February 1993, *Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon (Poucet and Pistre)*, C-159/91, ECLI:EU:C:1993:63; see Judgement of 19 January 1994, *SAT Fluggesellschaft mbH v. Eurocontrol*, C-364/92, ECLI:EU:C:1994, paragraph 18.

[42] Judgement of 19 January 1994, *SAT Fluggesellschaft mbH v. Eurocontrol,* C-364/92, ECLI:EU:C:1994, paragraph 30.

[43] Judgement of 18 March 1997, *Diego Cali & Figli Sri v. Servizi Ecologici Porto di Genova SpA*, C-343/95, ECLI:EU:C:1997:160.

[44] Judgement of 16 June 1987, *Commission v. Italy*, C-118/85, ECLI:EU:C:1987:283.

[45] Judgement of 18 March 1997, *Diego Cali & Figli Sri v. Servizi Ecologici Porto di Genova SpA*, C-343/95, ECLI:EU:C:1997:160, paragraphs 16 ff.

[46] *Id*., paragraph 23.

[47] Judgement of 11 July 1985, *Commission v. Germany*, 107/84, ECLI:EU:C:1985:332.

it engages as a public authority" can be considered economic activity.[48] The GC held that fees levied for airport management fell outside of statutory aviation supervisory tasks and, thus, constituted economic activity subject to competition law scrutiny.[49] Interestingly, the GC factored into its decision that when an activity could be carried out by a private firm, this amounted to further evidence that this activity is separate from the exercise of public authority.[50] This GC judgement, including this 'further evidence' factor, was affirmed by the ECJ on appeal.[51]

In the subsequent *MOTOE* judgement, the ECJ integrated the findings of *SAT Fluggesellschaft* and *Aéroports de Paris*. This case concerned a reference for preliminary ruling from Greece, in which a motor racing organizer held the Greek motor sports association abused its dominance. From the combined application of *SAT* and *Aéroports*, the ECJ inferred that when an entity is classified to exercise its public authority for one of its activities, this does not preclude it from undertaking separate economic activities. Consequently, "classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity".[52] Therefore, the Court concluded that the motor sports association was both involved in public supervisory tasks *and* economic activities by organizing motor sports events. For the latter activities, competition law applied.[53] Moreover, the Court re-iterated *Aéroports de Paris*' finding that parallel activity by commercial firms provided 'further evidence' that an activity by a public entity could be regarded as economic activity, adding that whether or not actual profits were made was irrelevant.[54]

---

[48] Judgement of 12 December 2000, *Aéroports de Paris v. Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 108.

[49] *Id*., paragraphs 111 ff.

[50] *Id*., paragraph 124.

[51] Judgement of 24 October 2002, *Aéroports de Paris v. Commission*, C-82/01, ECLI:EU:C:2002:617, paragraphs 68-83.

[52] Judgement of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, C-49/07, ECLI:EU:C:2008:376, paragraph 25; See also Judgement of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, C-49/07, Opinion of Advocate General Kokott, ECLI:EU:C:2008:142, paragraph 49.

[53] Judgement of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio,* C-49/07, ECLI:EU:C:2008:376, paragraph 29.

[54] *Id*., paragraphs 27 ff.

B. The pivot of Selex and Compass Datenbank

The *Selex* cases (also sometimes referred to as *Eurocontrol II*) were argued both before (GC) and after (ECJ) *MOTOE*. These cases followed an abuse of dominance complaint against Eurocontrol by Selex, an air traffic management systems developer. In a reprise of *SAT Fluggesellschaft*, it was contested to what extent ancillary activities by Eurocontrol constituted economic activity for the purposes of competition law. After the Commission dismissed Selex's complaint, the firm brought an action before the GC to contest the Commission's Decision.

The GC found that while Eurocontrol's R&D activities were part of its exercise of public authority, its standard-setting[55] and consulting activities could be separated from its exercise of public authority. Particularly the consulting activities ("assisting the national administrations") are of interest here,[56] as the GC added more 'further evidence' factors for finding economic activities besides parallel activity by commercial firms established in *Aéroports de Paris* and *MOTOE*. Also, non-essential or non-indispensable activities related to public authority tasks would point towards economic activity and thus competition law scrutiny.[57]

While the GC classified Eurocontrol's consulting activities as economic, it did not find abuse of dominance. Selex then appealed to the ECJ. Upon appeal, both AG Trstenjak[58] *and* the ECJ firmly rejected both Selex' pleas *and* much of the GC's reasoning on the alleged economic activity of Eurocontrol.

First, where the GC had found that Eurocontrol's standard-setting activities could be separated from its exercise of public authority, the ECJ related standard-setting to Eurocontrol's objective as defined in the Convention on the Safety of Air Navigation.[59] Second, the ECJ concluded that Eurocontrol's consulting activities were closely tied to the technical

[55] Judgement of 12 December 2006, *SELEX Sistemi Integrati SpA v. Commission*, T-155/04, ECLI:EU:T:2006:387, paragraphs 56-61.

[56] Regarding standard setting, the GC concluded that while this activities was indeed separate from Eurocontrol's public authority tasks, it did not constitute offering goods or services on a market, See Judgement of 12 December 2006, *SELEX Sistemi Integrati SpA v. Commission*, T-155/04, ECLI:EU:T:2006:387, paragraph 62.

[57] Judgement of 12 December 2006, *SELEX Sistemi Integrati SpA v. Commission*, T-155/04, ECLI:EU:T:2006:387, paragraphs 86-87.

[58] Judgement of 26 March 2009, *SELEX Sistemi Integrati SpA v. Commission*, C-113/07 P, Opinion of Advocate General Trstenjak (3 July 2008) ECLI:EU:C:2008:382.

[59] Judgement of 26 March 2009, *SELEX Sistemi Integrati SpA v. Commission*, C-113/07 P, ECLI:EU:C:2009:191, paragraph 92.

standardization task under the aforementioned Convention, and thus not separable from this exercise of public authority.[60] Moreover, the ECJ reversed the GC's reasoning, finding that also non-essential or non-indispensable activities can be deemed inseparable from the exercise of public authority.[61]

The final major judgement in this string of cases is *Compass Datenbank*, a preliminary reference from an Austrian court. The firm Compass Datenbank claimed the (government-run) Austrian company register abused its dominant position by not granting full access to it as a downstream firm offering enriched company register data to end-users. The court's judgement tied together the previously discussed case law, setting an integrated standard for the application thereof in case of possible economic activities by public entities. This doctrine can be summarized as follows:[62]

- Competition law applies to undertakings and undertakings are engaged in economic activity;
- activities that fall within the exercising of public authority are non-economic activities;
- any entity, including public entities, can be involved in both economic and non-economic activities;
- when a public entity is engaged in economic activity that can be separated from the exercise of its public authority, it acts as an undertaking for that activity;
- when a public entity exercises an economic activity that cannot be separated from the exercise of its public authority, "the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers".[63]

Note that the last step in this reasoning can create a situation in which a public entity may exercise economic activity, yet at the same time not be subject to competition law scrutiny because said activity is connected to the exercise of public authority. *Compass Datenbank* thus departs from the undertaking as a fully functional concept: it is no longer the case that

---

[60] *Id*., paragraph 76.

[61] *Id*., paragraphs 78 ff.

[62] Judgement of 12 July 2012, *Compass-Datenbank GmbH v. Republik Österreich*, C-183/11, ECLI:EU:C:2012:449, paragraphs 35-39.

[63] *Id*., paragraph 38.

an undertaking strictly concerns any entity engaged in economic activity. When the economic activity cannot be separated from the exercise of public authority, this economic activity is *not* subject to competition law. Concluding, the ECJ found that the Austrian company register's protection of its data against re-use was inseparable from its statutory task of making available company data.[64]

C. Further specification in state-aid case law

The notion of undertaking is not confined to EU competition law. In parallel to the developments in competition law, a separate case law emerged in state aid on economic activity related to the exercise of public power.[65] As the granting of state funds is only subject to state aid rules when granted to undertakings, various appellants sought to reverse Commission decisions finding incompatible state aid by claiming the recipient was not involved in economic activity. This case law would eventually enrich the *Compass* doctrine through the *TenderNed* cases.

First, in *Mitteldeutsche Flughafen*, the appellants argued that the granting of state aid for the construction of a new runway of a regional airport was not directed at an undertaking, as the construction was not an economic activity.[66] Here the GC developed an altogether new reasoning expanding the concept of economic activity. According to the GC, the construction of a runway cannot be "dissociated" from the operation of that runway, and as the latter is an economic activity the former should be as well.[67] However, upon appeal, the ECJ clarified this reasoning of the GC by stating that even when an activity could not be dissociated from related economic activity, it could hypothetically still fall within the exercise of public authority and thus be excluded from state aid scrutiny.[68]

The following case of *Zweckverband* concerned alleged illegal state aid towards a public organization for disposal of animal by-products. The GC

---

[64] *Id*., paragraph 49.

[65] Juan Jorge Piernas López, "When is a company not an undertaking under EU competition law? The contribution of the *Dôvera* judgment", *Common Market Law Review* 58, no. 2 (2021); Johan W. van de Gronden and Mary Guy, "The role of EU competition law in health care and the 'undertaking' concept", *Health Economics, Policy and Law* 16, no. 1 (2021): 76-89.

[66] Judgement of 24 March 2011, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v. Commission*, T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 92.

[67] *Id*., paragraphs 93-96.

[68] Judgement of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v. Commission*, C-288/11 P, ECLI:EU:C:2012:821, paragraph 47.

added two nuances to the interpretation of (economic) activities inseparable of the exercise of public authority. First, the GC remarked that even when an activity is undertaken in the public interest, this is not an informative factor in determining whether the activity takes place as part of the exercise of public authority.[69] Second, when a public authority has the discretion to outsource an activity and decides instead to undertake this activity itself, this 'insourcing' is also not an informative factor in deciding whether the activity falls within the exercise of public power.[70] Rather, in line with *MOTOE*, each activity should be assessed separately as (not) falling within the exercise of public power.[71]

Then, the *TenderNed* cases follow from an appeal against a Commission decision finding that the various functionalities afforded by a Dutch online public procurement platform were not economic activities, and therefore not subject to state aid law.[72] The facts here are distinct from the previously mentioned competition law cases, where various activities were *discretely* related to the exercise of public power to determine whether they could be separated thereof. *TenderNed*, instead, considers to what extent a string of interrelated activities can *jointly* be related to the exercise of public authority.

In the first *TenderNed* case, the GC set out to determine to what extent the various functionalities of the public procurement platform (such as publication of tender notices, a communication platform between contracting parties and economic operators, and support services for economic operators) were independent of each other. If so, their separation of the exercise of public authority should be assessed per activity, and if not, this should be assessed as a whole.[73] The GC found that if all of TenderNed's functionalities are indispensable for e-procurement and are subsequent facets of the same activity (procuring), then separating those would interfere with the public authority's objective of offering a central public procurement portal.[74] Therefore, these various activities are related to the exercise of

---

[69] Judgement of 16 July 2014, *Zweckverband Tierkörperbeseitigung v. Commission*, T-309/12, ECLI:EU:T:2014:676, paragraphs 58 ff.

[70] *Id*., paragraphs 62 ff.

[71] *Id*., paragraph 65.

[72] Commission Decision C(2014) 9548 on State aid SA.34646 (2014/NN) [2014].

[73] Judgement of 28 September 2017, *Aanbestedingskalender and Others v. Commission*, T-138/15, ECLI:EU:T:2017:675, paragraph 41.

[74] *Id*., paragraph 51.

public authority as a whole.[75] These activities as a whole, then, by their nature and purpose, "are closely linked to the activity of public procurement by contracting authorities and are therefore connected with the exercise of public powers".[76]

The ECJ, upon appeal, confirmed the GC's reasoning and for clarification applied the reasoning of *Compass Datenbank* and *Selex* more explicitly: when activities are rendered useless without each other or are otherwise closely linked, they can be considered inseparable.[77] Crucially, these criteria apply to both the separation between interrelated activities and the separation of one or all activities from the exercise of public authority.[78] The *TenderNed* cases thus widen the scope of the *Compass* doctrine: multiple interrelated activities can as a whole be considered inseparable from the exercise of public power.

D. The Compass *doctrine, taken together*

Based on the above case law analysis tying together competition law and state aid law, the *Compass* doctrine leads to the outcome where a public entity can be involved in economic activity – or a string of interrelated activities of which one is economic – which nonetheless cannot be separated from the exercise of public power. In that case, the public authority is not regarded as an undertaking under competition law and its activity cannot be scrutinized under competition law. The *Compass* doctrine, thus, allows for entities engaged in economic activity who yet are not considered undertakings under EU competition law.

This offers a departure from the common understanding that an undertaking is any entity engaged in economic activity. With the *Compass* doctrine, two outcomes emerge: economic activity that *is* subject to competition law, and economic activity that *isn't* – because it is not separable from the exercise of public power. While being involved in economic activity is generally thought to be a *sufficient* condition for being designated an undertaking under EU competition law, the *Compass* doctrine reveals that economic activity instead may be a *necessary* condition for being an undertaking: any undertaking subject to EU competition law is involved

[75] *Id.*, paragraph 53.

[76] *Id.*, paragraph 59.

[77] Judgement of 7 November 2019, Case *Aanbestedingskalender and Others v. Commission*, C-687/17 P, ECLI:EU:C:2019:932, paragraph 44.

[78] *Id.*, paragraphs 76-81.

in economic activity, but being involved in economic activity in and of itself is not sufficient to be an undertaking. This marks a departure from the undertaking as a fully functional concept. When activities are connected to the exercise of public authority, the decisive factor for the classification of an undertaking is no longer only what an entity *does* – being engaged in economic activity – but also what an entity *is* – a public entity.

The full extent of the *Compass* doctrine related to the (purportedly) functional approach to the undertaking in EU competition law seems to have gone largely unnoticed in the literature so far.[79] However, the outcome where public entities can be engaged in economic activity that yet falls outside of the scope of competition law raises further questions. First, how does economic activity as only a necessary condition for the application of competition law affect competition law enforcement? Second, how does the separation of the undertaking and economic activity relate to current market developments?

III. Assessing effects of the Compass *Doctrine*

Premised on an elaborate analysis of the individual cases underlying the *Compass* doctrine, it has been established in the previous chapter how the *Compass* doctrine as a whole undermines the functional approach to the undertaking. This undermining of the functional approach follows from the exclusion from competition law scrutiny of economic activity that is connected to the exercise of public authority. This finding may be striking on a doctrinal level, given how the literature typically considers the functional nature of the undertaking as firmly established and non-controversial.[80] However, finding how the cases of the *Compass* doctrine lead to an undermining of the functional approach to the undertaking *ipso facto* constitutes nothing more (or less) than a novel interpretation of a well-studied case law. The *Compass* doctrine is only problematic beyond the realm of legal scholarship when it comes with adverse effects on the application of competition law in practice.

---

[79] Only Araujo Boyd remarks that concept of the undertaking after *Compass Datenbank* and the *TenderNed* cases now allows for "a layer of protection to State activities from scrutiny under EU competition law that came on top of that already provided by Article 106 TFEU. The restrictive interpretation of what may be considered 'economic' and a generous reading of 'links' between public power and State measures and the role of State supervision has arguably extended the exemption even further". Araujo Boyd, "The notion of undertaking in EU competition law", 157.

[80] Dunne, "Public interest and EU competition law"; Jones, "The boundaries of an undertaking in EU competition law"; Odudu, "The meaning of undertaking within 81 EC".

Therefore, the present chapter explores the effects of the *Compass* doctrine. Given the established undermining of the functional approach to the undertaking, what effects can be observed or expected in competition law practice? In this chapter, effects on two levels will be addressed: effective competition law enforcement and competitive mechanisms on mixed markets.

A. The Compass *doctrine negatively affects effective enforcement*

As described in chapter II above, the notion of the undertaking as the subject of EU competition law is known (and taught) to be a functional rather than a formal concept: "[competition law] focuses on the type of activity performed rather than on the characteristics of the actors which perform it, the social objectives associated with it, or the regulatory or funding arrangements to which it is subject in a particular Member State".[81]

A focus on what an undertaking *does* over what it *is* rightly pre-empts definitional discussion about which entities can(not) be scrutinized under competition law. The functional approach thus allows for more effective enforcement, as "there are no bodies that cannot be considered undertakings, only activities that are not considered economic".[82] Taken together, however, the three cases underlying the *Compass* doctrine undermine the functional approach to the undertaking. This undermining of the functional approach, in turn, prevents effective enforcement by national competition authorities.

With the *Compass* doctrine, however, the functional approach to the undertaking is undermined. First, following *Compass Datenbank*, even when an activity by a public entity is deemed economic, the public entity does not act as an undertaking when this activity cannot be separated from the exercise of public authority. In such cases, competition law does not apply.[83] The exercise of public authority by a public entity here supersedes its activities, irrespective of the economic or non-economic nature of those activities. Consequently, the very same type of activity could be branded as subject to competition law in some cases and not subject to competition

---

[81] Judgement of 16 March 2004, *AOK Bundesverband*, C-264/01, C-306/01, C-354/01 and C-355/01, Opinion of Advocate General Jacobs (22 May 2003) ECLI:EU:C:2003:304, paragraph 25.

[82] Odudu, "The meaning of undertaking within 81 EC", 213.

[83] Judgement of 12 July 2012, *Compass-Datenbank GmbH v. Republik Österreich*, C-183/11, ECLI:EU:C:2012:449, 38.

law in others by virtue of the legal status of the entity that exercised it. This turns the functional approach to the undertaking on its head.

Second, following *Selex*, the bar to classify economic activities as inseparable from the exercise of public authority is quite low: these activities need not be essential or indispensable vis-à-vis a public entity's public authority tasks.[84] This weakens the functional approach to the subject of competition law further: activities that would clearly be economic when carried out by a private entity may be classified as non-economic when undertaken by a public entity.

Third, following the *TenderNed* cases, a string of distinct but related activities of a public entity may be connected as a whole to the exercise of public power, instead of a separate classification per activity that the ECJ prescribed in *MOTOE*.[85] This line of reasoning is another weakening factor to the functional approach, as it allows a string of connected activities to be inseparable from the exercise of public authority as a whole. This also applies if that string includes economic activities that would be individually separable from the exercise of public authority.

The harmful effect to the functional approach to the concept of undertaking can lead to divergent enforcement outcomes across member states.[86] One particularly striking application of the *Compass* doctrine has materialized in Dutch enforcement practice.

First, the Dutch competition authority rejected a complaint by a (private) payrolling firm against the payrolling subsidiary of the (public) administrator for public insurance schemes. These payrolling services were set up to remunerate self-employed healthcare providers. The private payrolling firm alleged being driven from the market by the public payroller, who priced its payrolling services below the marginal cost level. Premised on the *Compass* doctrine, the competition authority held that payrolling activities could not be separated from the administrator's public authority task of administering public insurance schemes and, therefore, could not be considered economic activity by an undertaking under EU competition law. Because the public payroller was not considered an undertaking, the

---

[84] *Selex ECJ* (n 50) paragraphs 78-79.

[85] Judgement of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, C-49/07, ECLI:EU:C:2008:376, paragraph 25.

[86] Brook, Non-competition interests in EU antitrust law: An empirical study of Article 101 TFEU, 254.

complaint could not be discussed on the merits by the Dutch competition authority.[87]

Second, a number of complaints and ensuing litigation followed from the Dutch Land Registry's introduction of its own Geographic Information System (GIS) software, which was competing with private GIS software providers. GIS software enriches publicly available data about soil condition and underground infrastructure and is used by firms active in dredging and excavation. In the first case, a private GIS software provider complained it was being driven from the market by the Land Registry's GIS software, which was offered free of charge. The Dutch competition authority dismissed the complaint: the Land Registry's offering of GIS software was not considered economic activity by an undertaking under EU competition law, as this was connected to the Land Registry public authority task making geological data publicly available. This finding was, again, premised on the combined reasoning of *Selex*, *Compass Datenbank* and *TenderNed*.[88] The district court[89] and appeals court[90] confirmed the Dutch Competition Authority's finding, including its application of the *Compass* doctrine. Shortly after the first case, a number of GIS software developers lodged a new complaint before the competition authority against the Land Registry. The complainants were again alleging being driven from the market, this time by the Land Registry's free GIS app for the iOS and Android mobile operating systems.[91] Here too, the competition authority applied the *Compass* doctrine and ultimately found the Land Registry's offering of a free GIS app to be connected to its exercising of public authority, and therefore no economic activity of an undertaking under EU competition law.[92] This finding was again confirmed upon appeal before the district court.[93]

What these two cases from Dutch enforcement practice have in common is that, by virtue of the *Compass* doctrine, services offered by public entities did not qualify as economic activity by an undertaking under EU

---

[87] Besluit handhavingsverzoek salarisadministratie SVB, ACM/18/032642 (2018).

[88] Besluit handhavingsverzoek Klic viewer, ACM/DM/2016/207444_OV (2016).

[89] Bouwens Beek Automatisering B.V. h.o.d.n. Prosilic v. ACM, ECLI:NL:RBROT:2018:3827 (2018).

[90] Bouwens Beek Automatisering B.V. h.o.d.n. Prosilic v. ACM, ECLI:NL:CBB:2019:204 (2019).

[91] Besluit ACM inzake de doorontwikkelde KLIC-viewer van het Kadaster, ACM/20/038656 (2021).

[92] Besluit op de bezwaren van BlindGuide, Geodirect, GOconnectIT, MijnKlic, Prosilic, Syntax Inframediairs, GO WIBON en Spatial Eye tegen het besluit van de Autoriteit Consument en Markt van 9 februari 2021 met kenmerk ACM/UIT/542080, ACM/21/051022 (2021).

[93] GOconnectIT et al. v. ACM (District Court Rotterdam 2022).

competition because a public entity's economic activity could not be separated from the exercise of the powers of public authority. Because of this, the competition authority and courts were unable to assess the merits of the competition law complaints by private competitors.

It thus becomes clear what the consequences can be of an eroding of the functional approach to the undertaking that follows from the *Compass* doctrine on enforcement. Under the *Compass* doctrine, enforcement of alleged anticompetitive behaviour by public entities is at least partially premised on the nature of the entity instead of only its behaviour. With the *Compass* doctrine, NCAs effectively face an impediment to enforcing against public entities. After all, it will often be the case that a public entity's (economic) activity is at least somewhat related to its exercise of public authority. Naturally, NCAs and courts have discretion in applying the *Compass* doctrine, but the experience in the Netherlands shows deference to the CJEU's aggregated reasoning of *Selex*, *Compass Datenbank*, and *TenderNed*.

B. The Compass doctrine affords unforeseen anticompetitive behaviour in mixed markets

When considering the facts behind the 'public authority exception' cases before the CJEU, it is striking that many of these cases are premised on a relatively clear distinction between traditionally public authority tasks and private sector activities. For instance: route charges, R&D and standard setting in air traffic control are intuitively connected to the public authority task of aviation supervision, while airport management charges are not. Similarly, supervising sporting events towards public safety is connected to exercising public authority, while organizing sporting events is not. Under such circumstances, the *Compass* doctrine offers a straightforward legal framework that is slightly (and perhaps also rightly) tilted towards the public entity striving to best perform its public authority tasks.

Moreover, when considering each of the above cases individually, it seems defensible to, for instance, not separate R&D and standard-setting from public air traffic control tasks, or to consider a suite of e-procurement tools as an integral whole facilitating public procurement. However, the CJEU's case-by-case approach considering the "nature, its aim and the rules to which [the activity] is subject"[94] has led to a number of case-specific findings that aggregate towards overall conclusions on the nature of

[94] *Id*., paragraph 23.

the undertaking in EU competition law. When adding up the impact of *Selex*, *Compass Datenbank* and *TenderNed*, the sum amounts to more than the original parts.

It is questionable whether this clear distinction between public authority tasks and private sector activities still holds currently, and if the joint force of the cases within the *Compass* doctrine is helpful in the absence of such a distinction. This becomes apparent with the rise of competition between public entities and private firms on so-called mixed markets.

Mixed markets have existed for a long time, where typically competition would take place between (partially) state-owned entities (SOEs) and private firms – think of energy, rail traffic or aviation.[95] A new type of mixed market, however, materialized across the EU after the financial crisis of the early 2000s and the austerity measures that followed.[96] As public entities were confronted with budget cuts by central governments, they were incentivized or encouraged to independently generate revenue by exploring commercial activities.[97]

This development mainly materialized in government agencies, and particularly those that are public sector information holders (PSIHs).[98] While the commercial potential of public sector information (PSI) has long been recognized,[99] commercial usage of PSI by PSIH agencies themselves seems to have been missed in the literature. Indeed, in a number of EU member states, PSIHs have started actively monetizing their data, developing services that compete with private developers of enriched PSI data. Think of tailored meteorological services by the Finnish, Swedish and French national meteorological agency, statistical analysis by the Finnish national statistics agency, and enhanced digital services by the Spanish certification agency. Moreover, in the Netherlands alone, the chamber of commerce,

---

[95] De Fraja, "Mixed oligopoly: Old and new", in *The pros and cons of competition in/by the public sector* (Stockholm: Swedish Competition Authority, 2009), 11-42.

[96] Sluijs, "Commercial divisions of public entities and the limits of EU competition law".

[97] OECD, *Competitive neutrality: Maintaining a level playing field between public and private business* (Paris: OECD Publishing, 2012), 21.

[98] For more background on PSIH, see Rufus Pollock, "The economics of public sector information", in *Access to public sector information: Law, technology and Policy*, ed. Brian F. Fitzgerald (Sydney: Sydney University Press, 2010), 14-47.

[99] Josef Drexl, "The competition dimension of the European regulation of public sector information and the concept of an undertaking", in *State-initiated restraints of competition*, ed. Josef Drexl and Vicente Bagnoli (Cheltenham, UK; Northhampton, MA: Edward Elgar, 2015), 64-100.

the national statistics agency, the land registry, and the national forensic research agency are commercially offering enhanced PSI data services.[100]

The competitive advantages of the public entities on these kinds of mixed markets have been well documented: because of cross-subsidies from tax revenue, bankruptcy protection, better access to information and infrastructure and lower capital costs, they can afford to compete more aggressively on markets and allow for slimmer margins.[101] These advantages can allow the public entity to drive out competition[102] or deter entry.[103] There have been competition law complaints against PSIH agencies in mixed markets in France (against the meteorological institute)[104] and the Netherlands (against the administrator for public insurance schemes and the land registry).[105] In the latter case, as documented above, competition law was concluded not to apply by the NCA and national courts, as offering (enriched) geo information software was considered inseparable from the land registry's public authority task of making geo information publicly available.

A situation now emerges where the same anticompetitive behaviour falls within the scope of competition law when perpetrated by a private entity, and outside the scope of competition law when executed by a public entity. When, for instance, a national statistics agency withholds access to parts of its data to downstream competitors to favour its own commercial statistical analysis service, the *Compass* doctrine could lead a Competition Authority to conclude that the analysis of statistics cannot be separated from the statutory task of producing statistics and is, therefore, not to be subject to competition law. In fact, a number of private firms who accuse the Netherlands Statistics Agency of such conduct have had to resort to

---

[100] For a complete overview, see Sluijs, "Commercial divisions of public entities and the limits of EU competition law".

[101] OECD, "Competitive neutrality in competition policy", 2015, 7.

[102] De Fraja, "Mixed oligopoly: Old and new"; David E. M. Sappington and J. Gregory Sidak, "Are public enterprises the only credible predators?", *The University of Chicago Law Review* 67, no. 1 (2000): 271-292; David E. M. Sappington and J. Gregory Sidak, "Incentives for anticompetitive behavior by public enterprises", *Review of Industrial Organization* 22, no. 3 (2003): 183-206.

[103] Arvid Fredenberg, "Introduction", in *The pros and cons of competition in/by the public sector*, ed. Arvid Fredenberg (Swedish Competition Authority, 2015), 2; OECD, "Competitive neutrality in competition policy", 16.

[104] "Décision du 23 janvier 2012 relative à des pratiques mises en œuvre dans le secteur de la fourniture d'informations météorologiques aux professionnels", 12-D-04 [2012] English press release available at: https://bit.ly/2ktcEff.

[105] See *supra* notes 74 and 75.

filing a civil suit grounded in sector-specific regulation because of the expected inadequacy of competition law.[106]

When assessing the case law and its development towards the *Compass* doctrine, it seems the CJEU never foresaw the advent of purely commercial behaviour by public entities on mixed markets. The premise that activities that cannot be separated from the exercise of public authority cannot amount to economic activity is intuitive in a world in which the public and private sectors are clearly separated. This is clearly not the case anymore when public entities set up commercial divisions that start competing against private firms. Moreover, public entities with commercial ambitions can use the *Compass* doctrine to strategically seek to avoid competition law scrutiny. While the CJEU seems to have established the individual cases underlying the *Compass* doctrine as a shield to enable proper execution of public authority tasks, the *Compass* doctrine as a whole can now be used as a sword to infringe competition law with impunity.

IV. Conclusion: time to revisit the Compass *doctrine*

This article has outlined that while EU competition law (rightly) takes a functional approach to the notion of undertaking and its economic activity, a string of cases developing since the 1980s lead to what is coined in this article as the *Compass* doctrine: economic activity of a public entity falls outside of the scope of competition law altogether when it is connected to the exercise of public authority.

This article chronicled the development of this doctrine by extensive analysis of the early case law on the 'public authority' (mainly *SAT Fluggesellschaft*, *Diego Cali*, *Aéroports de Paris* and *MOTOE*), the consequential cases *Selex* (ECJ) and *Compass Datenbank*, and extensions thereof through the state aid case law (mainly *TenderNed*). Then, the article critically assessed the doctrine by outlining two effects. First, by undermining the functional approach to the undertaking as the subject of competition law, the *Compass* doctrine impedes effective enforcement. Second, the *Compass* doctrine creates incentives for strategic behaviour by public entities, who can position themselves to infringe competition law with impunity on mixed markets.

---

[106] "Statistiekbureaus beginnen rechtszaak over bijverdiensten CBS", *Het Financieele Dagblad*, November 23, 2020, https://fd.nl/economie-politiek/1363478/statistiekbureaus-beginnen-rechtszaak-over-bijverdiensten-cbs.

These consequences are by no means hypothetical, as is demonstrated by national enforcement practice on mixed markets, mainly in the Netherlands. Here, NCA and courts are unable to discuss the merits of competition law complaints against public entities on mixed markets, as the (economic) activities of these public entities are not able to be separated from the exercise of public power. These practices in the Netherlands should be regarded as a canary in the coal mine for mixed markets across the EU. The enforcement deficit following from the *Compass* doctrine may embolden public sector information holding agencies as they increasingly monetize data they generate under their public authority.

Notwithstanding the decidedly case-specific approach of the CJEU towards mixed markets, the consequences of the *Compass* doctrine aggregate beyond the outcomes of the individual cases. This aggregating factor may have never been foreseen by the CJEU, yet it is incumbent on the Court to mitigate it.

Therefore, it would appropriate for the CJEU to reconsider the *Compass* doctrine in future cases, for which the most straightforward opportunity would present itself in preliminary questions from a member state court. After all, the consequences of the *Compass* doctrine materialize in national competition law enforcement practice. In this scenario, an appeal procedure against an NCA decision applying the *Compass* doctrine could be referred to the ECJ with preliminary questions. These questions could pertain to the tension between the CJEU's self-professed functional approach to the undertaking and the aggregate effect of the *Compass* doctrine in challenging this functional approach. The present article, and the argument presented therein, could inform both the referral for a preliminary ruling and the ECJ's deliberation in the prejudicial proceeding itself.

Premised on the outcomes of this research, it would be recommended for the ECJ to return to the legal framework of the first *Selex* case. Herein, the GC consistently applied the *MOTOE* standard of assessing each activity of a public entity distinctly to determine whether it is economic or not. Note that under this framework, following *Aéroports de Paris* it would still be possible to arrive at the conclusion that an activity of a public entity cannot be separated from the exercise of public authority. The crucial difference here is that the concept of *economic* activity remains undivided. In contrast to the *Compass* doctrine, once the activity is considered economic

(the trading of goods and services on a market), it should no longer be considered as (not) separable from the exercise of public authority. Therefore, the *Compass* doctrine would be modified to:

- Competition law applies to undertakings and undertakings are engaged in economic activity;[107]
- activities that fall within the exercising of public authority are non-economic activities;[108]
- any entity, including public entities, can be involved in both economic and non-economic activities;[109]
- inasmuch as a public entity is engaged in economic activity, it acts as an undertaking for that activity. When the activity is undertaken in parallel by private entities, or is non-essential or not indispensable, these are (non-limitative) indicators that the activity is economic.[110]

This way, the undertaking returns to mixed markets as a fully functional concept. This approach, moreover, offers a broad standard for NCAs and courts to assess alleged anticompetitive behaviour of public entities on the merits, rather than potentially being hamstrung by a too narrow definition of undertaking. Consequently, opportunities for strategic behaviour by entrepreneurial public entities are strongly diminished: under this standard, the public entity engaged in economic activity rightly will be assessed as any other undertaking in EU competition law. Thus, the functional notion of the undertaking retains the status of a duck test: if an entity looks like an undertaking, quacks like an undertaking and is involved in economic activity like an undertaking, then it probably is and should be an undertaking.

---

[107] Judgement of 23 April 1991, *Höfner and Elser v. Macrotron GmbH*, C-41/90, ECLI:EU:C:1991:161; Judgement of 17 February 1993, *Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon (Poucet and Pistre)*, C-159/91, ECLI:EU:C:1993:63.

[108] Judgement of 11 July 1985, *Commission v. Germany*, 107/84, ECLI:EU:C:1985:332; Judgement of 19 January 1994, *SAT Fluggesellschaft mbH v. Eurocontrol*, C-364/92, ECLI:EU:C:1994.

[109] Judgement of 12 December 2000, *Aéroports de Paris v. Commission*, T-128/98, ECLI:EU:T:2000:290.

[110] Judgement of 12 December 2006, *SELEX Sistemi Integrati SpA v. Commission*, T-155/04, ECLI:EU:T:2006:387, paragraphs 86 ff.

Bibliography

Araujo Boyd, Marcos. "The notion of undertaking in EU competition law". PhD, University of Glasgow, 2023. https://theses.gla.ac.uk/83415/.

Besluit ACM inzake de doorontwikkelde KLIC-viewer van het Kadaster, ACM/20/038656 (2021).

Besluit handhavingsverzoek Klic viewer, ACM/DM/2016/207444_OV (2016).

Besluit handhavingsverzoek salarisadministratie SVB, ACM/18/032642 (2018).

Besluit op de bezwaren van BlindGuide, Geodirect, GOconnectIT, MijnKlic, Prosilic, Syntax Inframediairs, GO WIBON en Spatial Eye tegen het besluit van de Autoriteit Consument en Markt van 9 februari 2021 met kenmerk ACM/UIT/542080, ACM/21/051022 (2021).

Bouwens Beek Automatisering B.V. h.o.d.n. Prosilic v. ACM, ECLI:NL:RBROT:2018:3827 (2018).

Bouwens Beek Automatisering B.V. h.o.d.n. Prosilic. v ACM, ECLI:NL:CBB:2019:204 (2019).

Brook, Or. *Non-competition interests in EU antitrust law: An empirical study of Article 101 TFEU*. Global Competition Law and Economics Policy. Cambridge: Cambridge University Press, 2022. https://doi.org/10.1017/9781108946674.

Case 107/84 *Commission v. Germany*, ECLI:EU:C:1985:332 (1985).

Case 155/73 *Giuseppe Sacchi*, ECLI:EU:C:1974:40 (1974).

Case C-35/96 *Commission v. Italy*, ECLI:EU:C:1998:303 (1998).

Case C-41/90 *Höfner and Elser v. Macrotron GmbH*, ECLI:EU:C:1991:161 (1991).

Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio,* ECLI:EU:C:2008:376 (2008).

Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, Kokott AG, ECLI:EU:C:2008:142 (2008).

Case C-82/01 *Aéroports de Paris v. Commission*, ECLI:EU:C:2002:617 (2002).

Case C-113/07 P *SELEX Sistemi Integrati SpA v. Commission*, ECLI:EU:C:2009:191 (2009).

Case C-113/07 P *SELEX Sistemi Integrati SpA v. Commission*, Trstnjak AG, ECLI:EU:C:2008:382 (2008).

Case C-118/85 *Commission v. Italy*, ECLI:EU:C:1987:283 (1987).

Case C-159/91 *Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon (Poucet and Pistre)*, ECLI:EU:C:1993:63 (1993).

Case C-183/11 *Compass-Datenbank GmbH v. Republik Österreich*, ECLI:EU:C:2012:449 (2012).

Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v. Dansk Landbrugs Grovvareselskab AmbA*, ECLI:EU:C:1994:413 (1994).

Case C-309/99 *Wouters et al. V. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98 (2002).

Case C-343/95 *Diego Cali & Figli Sri v. Servizi Ecologici Porto di Genova SpA*, ECLI:EU:C:1997:160 (1997).

Case C-364/92 *SAT Fluggesellschaft mbH v. Eurocontrol*, ECLI:EU:C:1994:7 (1994).

Case C-475/99 *Firma Ambulanz Glöckner v. Landkreis Südwestpfal*, ECLI:EU:C:2001:577 (2001).

Case T-99/04 *AC-Treuhand AG v. Commission*, ECLI:EU:T:2008:256 (2008).

Case T-128/98 *Aéroports de Paris v. Commission*, ECLI:EU:T:2000:290 (2000).

Case T-155/04 *SELEX Sistemi Integrati SpA v. Commission*, ECLI:EU:T:2006:387 (2006).

Case T-319/99 *FENIN v. Commission*, ECLI:EU:T:2003:50 (2003).

Case C-288/11 P, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v. Commission*, ECLI:EU:C:2012:821 (2012).

Case T-309/12, *Zweckverband Tierkörperbeseitigung v. Commission*, ECLI:EU:T:2014:676 (2014).

Case T-138/15 *Aanbestedingskalender and Others v. Commission*, ECLI:EU:T:2017:675 (2017).

Case C-687/17 P *Aanbestedingskalender and Others v Commission*, ECLI:EU:C:2019:932 (2019).

Colino, Sandra Marco. *Competition law of the EU and UK*. Oxford University Press, 2019.

De Fraja. "Mixed oligopoly: Old and new". In *the pros and cons of competition in/by the public sector*, 11-42. Stockholm: Swedish Competition Authority, 2009.

Drexl, Josef. "The competition dimension of the European regulation of public sector information and the concept of an undertaking". In *State-initiated restraints of competition*, edited by Josef Drexl and Vicente Bagnoli, 64-100, 2015.

Dunne, Niamh. "Public interest and EU competition law". *The Antitrust Bulletin* 65, no. 2 (2020): 256-281.

Ezrachi, Ariel. *EU competition law: An analytical guide to the leading cases*. Oxford: United Kingdom, 2021.

Fredenberg, Arvid. "Introduction". In *The pros and cons of competition in/by the public sector*, edited by Arvid Fredenberg, 8-11. Swedish Competition Authority, 2015.

GOconnectIT et al. v. ACM (District Court Rotterdam 2022).

Gronden, Johan W. van de, and Mary Guy. "The role of EU competition law in health care and the 'undertaking' concept". *Health Economics, Policy and Law* 16, no. 1 (2021): 76-89.

Het Financieele Dagblad. "Statistiekbureaus beginnen rechtszaak over bijverdiensten CBS". November 23, 2020. https://fd.nl/economie-politiek/1363478/statistiekbureaus-beginnen-rechtszaak-over-bijverdiensten-cbs.

Jentleson, Bruce W. "Beware the duck test". *The Washington Quarterly* 34, no. 3 (2011): 137-149.

Joined cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v. Commission*, ECLI:EU:C:1983:310 (1983).

Joined Cases C-101/07 P and C-110/07 P *Coop de France Bétail et Viande et al. V. Commission*, ECLI:EU:C:2008:741 (2008).

Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten,* ECLI:EU:C:2000:428 (2000).

Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband*, ECLI:EU:C:2004:150 (2004).

Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband*, Jacobs AG, ECLI:EU:C:2003:304 (2003).

Joined cases Cases T-443/08 and T-455/08, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v. Commission*, ECLI:EU:T:2011:117 (2011)

Jones, Alison. "The boundaries of an undertaking in EU competition law". *European Competition Journal* 8, no. 2 (2012): 301-331.

Jones, Alison, Brenda Sufrin, and Niamh Dunne. *EU competition law: Text, cases, and materials*. Seventh Edition. Text, Cases, and Materials. Oxford, New York: Oxford University Press, 2019.

Kloosterhuis, Erik. "Defining non-economic activities in competition law". *European Competition Journal* 13, no. 1 (2017): 117-149.

Lianos, Ioannis, Valentine Korah, and Paolo Siciliani. *Competition law: Analysis, cases, & materials*. Oxford, New York: Oxford University Press, 2019.

López, Juan Jorge Piernas. "When is a company not an undertaking under EU competition law? The contribution of the *Dôvera* judgment". *Common Market Law Review* 58, no. 2 (2021).

Odudu, Okeoghene. "The meaning of undertaking within 81 EC". *Cambridge Yearbook of European Legal Studies* 7 (2005): 211-241.

OECD. "Competitive neutrality in competition policy", 2015.

____. *Maintaining a level playing field between public and private business*. Paris: OECD Publishing, 2012.

Pollock, Rufus. "The economics of public sector information". In *Access to public sector information: Law, technology and policy*, edited by Brian F. Fitzgerald, 14-47. Sydney: Sydney University Press, 2010.

Sappington, David E. M., and J. Gregory Sidak. "Are public enterprises the only credible predators?" *The University of Chicago Law Review* 67, no. 1 (2000): 271-292.

____. "Incentives for anticompetitive behavior by public enterprises". *Review of Industrial Organization* 22, no. 3 (2003): 183-206.

Sauter, Wolf. *coherence in EU competition law*. Oxford University Press, 2016.

Sluijs, Jasper P. "Commercial divisions of public entities and the limits of EU competition law". *European Competition and Regulatory Law Review* 3, no. 3 (2019): 261-279.

Thépot, Florence. *The interaction between competition law and corporate governance: Opening the "black box"*. Cambridge University Press, 2019.

Van Rompuy, Ben. "The role of EU competition law in tackling abuse of regulatory power by sports associations". *Maastricht Journal of European and Comparative Law* 22, no. 2 (2015): 179-208.

Whish, Richard, and David Bailey. *Competition law*. Oxford University Press, 2018.

Zhu, Lei. "SGI: An EU expression of State functions". In *Services of general economic interest in eu competition law: Striking a balance between non-economic values and market competition*, 27-59. Legal Issues of Services of General Interest. The Hague: T.M.C. Asser Press, 2020.